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A

SELECTION

OF

LEADING CASES

ON

THE HINDU LAW OF INHERITANCE,

With Notes;

BY

THE HON'BLE JOHN BRUCE NORTON,

OF LINCOLN'S INN, BARRISTER AT LAW,

ADVOCATE GENERAL OF MADRAS,

AND

MEMBER OF THE LEGISLATIVE COUNCIL.

PART I.

"The reason of the Law is the life of the Law: for though a man can tell the law, if he know not the reason thereof, he shall soon forget his superficial knowledge. But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but of many others: for 'cognitio legis est copulata et complicita': and this knowledge will long remain with him.

"Tunc ununquodque scire dicimus, cum primam causam scire putamus. Scire autem est propriâ rem ratione et per causam cognoscere."

LD. COKE UPON LITT. SECT. 283.

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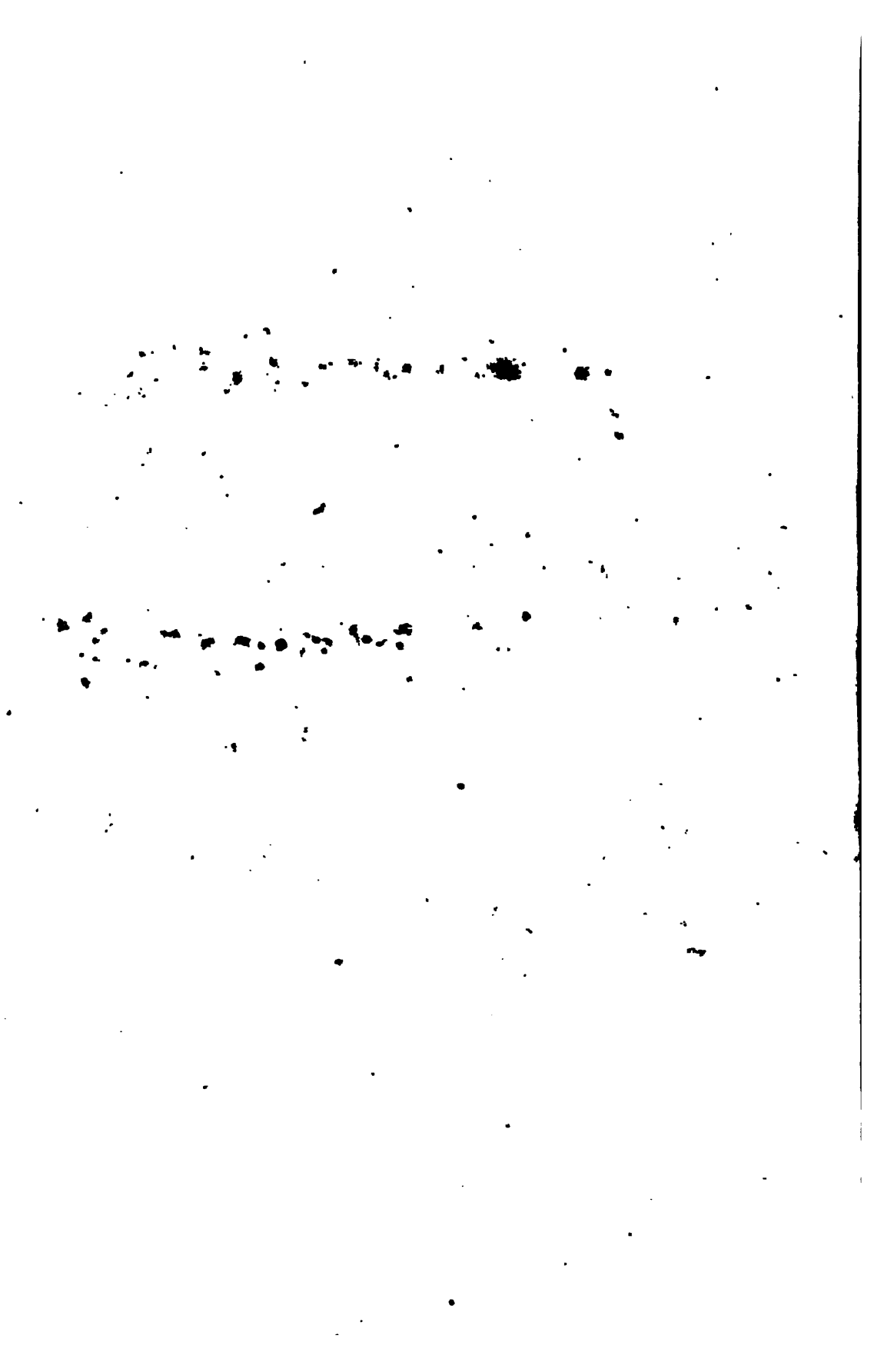

NOTICE.

As the labour in writing this Book has been far greater than I anticipated; as it will contain double the number of pages originally contemplated; as there have been unlooked for delays in getting it through the Press; and as inquiries for it are very frequent; I have determined to publish all now finished as Part I. It is complete as far as it goes; with Indices and Appendix. The rest of the work will be published as Part II., probably within six months. It will comprise the following subjects. Alienation by Gift: Alienation by Will; Widow's Estate; Zemindar's Estate; Succession in Undivided Families; and Succession in Divided Families. The topics of Hindu Law run so much into one another, that these already handled must necessarily receive much illustration from those which remains to be discussed. Unless this be borne in mind, some of the subjects in the present Part may seem incomplete.

In the absence of the Preface, which will appear with the second Part, I beg at once to acknowledge the deep obligation I am under to my learned friend, Mootoosawmy Iyer Esquire, the Third Judge of the Small Cause Court, for the assistance which he has rendered me, in furnishing what certainly forms a very valuable portion of the entire work, the Appendix of Slokas of Hindoo Sages of the Law.

LIST OF CASES REPORTED.

Page.

THE KING *v.* KISTNAMAH NAIKE (*Marriage*). 1

SENGAMALATHAMAL *v.* VALAYUDA MOODELLY (*Stridhanum*) 17

BHOIRUB CHUNDER GHOSE *v.* NOBO CHUNDER GHOSE (*Maintenance*). 31

SINGAMAH *v.* RAMANUJA CHARLU (*Adoption*). 52

BYKUNTATH ROY CHOWDRY *v.* N. P. POGOSE (*Minority and Guardianship.*) 109

GOPEEKRIST GOSAIN *v.* GUNGAPERSAUD GOSAIN (*Benamee*)... ... 134

LUXIMON ROW SADASEW *v.* MULLAR ROW BAJEE (*Co-parcenary*)... 169

APPOOVIER ALIAS SEETARAMIER *v.* RAMA SUBA AYAN. (*Division.*)... 254

LIST OF ABBREVIATIONS.

Bell	Bell's Reports.
Beng : S. D. R	Bengal Sudder Dewany Reports.
Beng : L. R	Bengal Law Reports (Select.)
Bomb : H. Ct. Rep :	Bombay High Court Reports.
Borr	Borrodaile's Reports.
Bourke	Bourke's Reports.
Broach Ad : Ct :	Broach Sudder Adaulut Court.
Cole Dig :	Colebrooke's Digest.
East's N. of C	Sir Hyde East's Notes of Cases.
Fult	Fulton's Reports.
H. Ct : R ; N. W. P	High Court Reports North-West Provinces.
Hyde's R	Hyde's Reports.
Macn :	Sir. W. MacNaughten.
F. Macn	Sir Francis MacNaughten.
Madras : H. Ct : Rep :	Madras High Court Reports.
Mad. Jur	Madras Jurist.
Mad. S. D. R	Madras Sudder Dewany's Reports.
Mad. Sel. D	Madras Select Decrees.
Marsh	Marshall's Reports.
Mitac :	Mitacshara.
Moore's. I. A	Moore's Indian Appeals.
Mor : Dig : (N. S.)	Morley's Digest (New Series.)
Mort	Morton's Reports.
P. O. C	Sir Erskine Perry's Oriental Cases.
R. A	Regular Appeal.
Sp : A	Special Appeal.
Str : H. L	Sir T. Strange's Hindu Law.
Str : Man :	Strange's Manual.
Suth :	Sutherland's Weekly Reporter.
W. & Büh	West and Bühler.
Wym	Wyman's Reports.

INDEX OF THE NAMES OF CASES.

PAGE.

A

A. Luchman Row S. *v.* A. Terimul R. Sahib..... 283
Abasse Dinkur *v.* Gungadhur W. Gosayee.....71,87
Abbas Ali *v.* Hurish Chunder Nag..... 117
Abalady Dabee *v.* M. Lukhymoonee Dabee..... 38
Ahollya Bai Debia *v.* Luckhee M. Debia.....38,42
Aiyodia Persaud Singh *v.* B. Ram Bushee..... 231
Akora Suth *v.* Boreani..... 16
Alank Manjari *v.* Fakir Chund Sowkar..... 62
Alimalu Ummal *v.* Arnachellum Pillay.....126,128
Alwar Ammal *v.* Ramasawmy Naiken..... 62
Amanee Tewarree *v.* Rai Rughoo B. Suhai... 145,151
Ameeroonissa Beebee *v.* Rinode Ram Sirkar..... 162
Anantaya *v.* Savitramma..... 35
Anand Mai *v.* Chandurayan. 127
Anon East's Notes of Cases.92,99
Anon *v.* Mooricolly Ramara Nambiar..... 282
Anundo Mohun Roy *v.* Lamb. 177
Anund Moyee Chowdrain *v.* Boykantnath Roy..... 279
Appanyengar *v.* Alamutu Umall..... 87
Appoo Tumbiran *v.* Tambrohamaid..... 88
Appoovier *v.* Rama Suba Iyen.....193,213,219,221,254
Arnachellum Pillay *v.* Iyasawmy Pillay..71,72,73,90,92

PAGE.

Arnachellum *v.* Venkoo..... 213
Arnachella Chetty *v.* Namasevoy Chetty..... 283
Aroonachella Pariary *v.* Chinacooty..... 45
Arundadi Ummal *v.* Kuppumall.....61,88,90
Ashutos Dossy *v.* Moheschunder Dut..... 198
Aswudda N. Sastri *v.* Luchmi Ummal..... 114
Atchama *v.* Munjoonadhay Baligay..... 268
Ayyavu Muppanar *v.* Niladatchi Ammal.....104,105

B

B. C. Doss and another *v.* M. Paramanic and others. 11
B. Candappah Chetty *v.* B. Kristnamah Chetty..... 179
B. Latchimuha *v.* Visvanada 232
B. Pudmanabiah *v.* B. Mooneammah..... 38
Baboo Sheo Manooj Singh *v.* Baboo Ram Prakas Singh..... 24
Baboo Gunput Singh *v* Gunga Pershad.....24,27
Baboo Runjeet Sing *v.* B. O. Narrain Singh..... 70
Baboo Naika *v.* Nagappa, alias Timapah.....115,124
Baboo Kumla P. Narain Sing *v.* Tokhe L. Shaboo..... 119
Baboo K. P. Narrain Sing *v.* Nokh Lal Sahoo..... 120
Baboo Khather Mohun Moorkerjee *v.* Baboo Chunder Madub Ghose..... 162

PAGE.

Babasbet Govindshet *v.* Jershet b. Yesshet..... 177
Baboo Nundeal Bhurm *v.* Mt. Neela Buttee..... 189
Baboo Luchmedur Sing. *v.* Ekbal Ali.....200,202
Baboo Konto Lall *v.* Baboo Greedharee Lall.....203,231
Baboo B. K. Suhye Sing *v.* Baboo H. B. Narrain Sing.....214,223,232,294
Baboo Goursurn Doss *v.* R. Bhughut.....232,294
Babaji Sakhoji *v.* Ramshet Pandushit..... 208
Badamoo Koer *v.* Wazeer Sing.....185,272
Baee Rulyat *v.* Jeychund Kewul. 4,11
Baee Lukmee *v.* Lukmudoss Gopaldoss..... 35
Baee Gunga *v.* Dhurmdoss Nursedoss..... 118
Bahadoor Ali Khan *v.* Meer Nussar Ali..... 160
Bahee S. Keshoor *v.* Rajkoonwar..... 248
Baicuntmoni Roy *v.* Soonder Roy..... 97
Bai Mancha *v.* Narotamda Kashidas.....177,282
Bairy Cundappa Chetty *v.* B. Jaganada Chetty..... 280
Bakubai *v.* Munchabhai..... 30
Ballabakant Choudree *v.* K. D. Chondrams..... 102
Balmokund *v.* Jhoona Lall... 241
Bamundoss Mookerjee and another *v.* Mt. Tarinee 97,99,115,177
Banee Madhub Mookerjee *v.* Bhugobutty C. Banerjee 188
Bannarassy Ghose *v.* Ramtonoo Dutt..... 243
Barroosoondry Dossee *v.* Cosinath Bysack..... 115
Basoo Cammumah *v.* Basoo C. Venkatasa..... 78

PAGE.

Bawane S. Pundit *v.* Ambbay Umall..... 104
Beebee Sing and others *v.* M. B. Koeree and others... 101
Beanlal Dibih *v.* Gointneth 278
Beer Narain Sirkar *v.* Teen Cowrie Nundee.....177,188
Belas Koer *v.* Bhowanee Buksh..... 272
Bhageruth *v.* Thummun Sing 188
Bhasker Buchajee *v.* Narroo Ragoonath.....62,87
Bhimana Gadu *v.* Tayappah and others..... 83
Bhoirub Chunder Ghose *v.* Nobo C. Ghodho.....31,82
Bhoobum Moyee Debia *v.* Ram Kishore Acharj 59,98,99
Bhowany C. Bunhoojia *v.* Heirs of Ramkaunt Bunhoojia, ... 233,270,299,303
Bhowanny P. Chowdry *v.* Ranee Jagadumba..... 279
Bhugwan C. Bose *v.* Bindoo B. Dossee.....34,40
Bhugwan Doss *v.* Apoock Sing..... 160
Bhyrab Audinarrain Raee *v.* Ranee B. Maye..... 124
Bhyroochund Rai *v.* Russoomunnee 295,298,299
Binode Koomaree Debee *v.* Purdhan Gopal Sahee 30
Bindabun Chunder Saha *v.* Janee Beebee..... 202
Bindoo B. Dabee *v.* Peary M. Bose..... 202
Bipro Pershaud Mitee *v.* Kena Dayee..... 175
Bisessur Chuckerbutty *v.* Seetul C. Chuckerbutty. 306
Bishambur Naick *v.* S. Mohaputtur.....200,228
Bisserur P. Sing Pandy *v.* B. S. Persaud.....214,223,232
Bodh Mull *v.* Gouree Shunker..... 120
Bodhrao Hunmont *v.* Nur-

WILLS ;—(*Continued.*) Page.
Minor cannot execute a will 367
Construction, rules of;
intention of Testator must be gathered 367
English law as to *limitations in tail male or executory devises* not applicable to Indian wills 368-401
perpetuities, true ground on which rule against, obtains in Indian wills, 338-393
various rules of construction imported from *Indian Succession Act* . 370
domicile, construction must accord with law of . . . 370
meaning gathered from context and surrounding circumstances . . 370
'children' held to include 'illegitimate' 370
'generation to generation' means for ever absolute . . . 370
Cypres ; whether doctrine of applies to Hindu will *quære.* . . 371
Probate ; of Hindu will; history of, ... 371-3
Effect of 373
Executor ; does not take property in moveables 375
will proved in former suit cannot be impeached in subsequent suit by same party 375
parties consenting to will, cannot impeach. 375
Act XXVIII of 1860 regulates grants in Provinces . . . 376
Indian Succession Act in Presidency Towns 376
Trusts ; can be created by a Hindu will 376-90
Perpetuities ; bequests in, except for religious uses, are void . . 390
Indian Succession Act bars 393
Mr. Fitz James Stephen's remarks 403
Oudh Act of 1869, s. 12 406
Charity and Pious uses, Bequests for; 406
are valid 406
English law against *Superstitious* uses does not apply . . . 407
Oudh Act 1 of 1869, s. 20 407
Estates Tail ; cannot be created by Hindu will 407
Particular Estates, may be created by will 412
WRITING; gift does not require 312
nor does any Hindu contract 312
will may be parol 365
WASTE; See *Widow's Estate.*

Y

YAUTACA; See Gift 329
YATI; See *Succession in Divided Families*

Z

ZEMINDAR; See *Succession in Divided Families.*
childless, in Madras, may will away property which would otherwise have passed to widow 355

WILLS;—(*Continued.*) *Page.*
undivided property, not subject 355
Zemindar, without issue, in Madras, may will away property which would otherwise have gone to his widow 356
whole property cannot be bequeathed, while there are heirs . 356
will not inofficious because it left widow unprovided for . . 356
whether testator can restrict interest of son in ancestral property to life-estate, *quære* 357-9
or can limit it over, if son has no issue 357
See *widow*
In Madras father cannot will away immoveable (ancestral) property against sons 357
Shotriumdar, will by, beyond own life, void 357
Soodra, cannot bequeath against illegitimate children . . 357
Remainder, executory devise, bequest of self acquisition, to take effect at close of life in being, valid 357
Government grantee cannot by will exclude his successor . . 359
father cannot by will prevent sons dividing 359
or alienating 359
testator cannot prevent legatee selling or mortgaging . 360
perpetuities, English law of, not applicable to Hindu will . 360
Bengal, man, absolute owner, can dispose of even ancestral estate . 360
whether son has even a right to maintenance, *quære* . . 360,361,363
if he has, each case must depend on its circumstances . . 361
father's will disinheriting son, sinful but operative, on principle of '*factum valet*' 361
bare maintenance enough, where son guilty of gross misconduct . 362
bequest must vest beneficial ownership in somebody . . . 361
accumulation, where trust, for, fails legatee takes absolutely . 361
enlarged powers of management will not pass ownership, where no power to appropriate profits 361
Certainty, bequest may fail for want of 361
heir at law cannot be disinherited; he takes by descent . . . 361
father, in *Bengal*, may bequeath to sons unequally . . . 364
Forms; no particular necessary 364
except where Indian Succession Act obtains 364
petition to authorities may constitute will 364
designatio personæ, what sufficient 364
nuncupative will, good 365
attestation, not requisite 366
signature, not requisite 367
later parol cancels earlier written will 366
Indian Succession Act, extended, provisions of 367
Sanity of testator at date of execution must appear . . . 367

PAGE.

sing Rao..... 283
Booa Russoolee *v.* The Nawab Nazim of Bengal... 168
Booloka Pandea C. Telaver *v.* Comarasawmy Telaver.....278,283,284
Boyee Umall *v.* Ootaram..... 47
Brajonath Ghose *v.* Koylash C. Bonnerjee..... 160
Bramavarapu Krishnaya *v.* B. Venkamah..... 35
Brejo Sundaree Debia *v.* Ranee L. Koonwaree.... 159
Brejonath's case..... 131
Brij Rutun Doss *v.* Brij Pal Doss.....178,280
Brown *v.* Ram Kunaee Dutt 122
Buddun C. Maduck *v.* C. Coomer Shahu..... 291
Buksheeram *v.* Mt. Durboo 248
Bulakee Lall *v.* Mt. Indurputtee Kowur.....273,275
Buldeo Ram Tewarree *v.* S. Pauray..... 242
Buraik Chuttur Sing *v.* Greeharee Sing.....215,231
Byjnak Bunboojia *v.* S. Bunboojia..... 213
Byjnath Sing *v.* Ramissur Dyal..... 221
Bkyuntnath R. Chowdry *v.* N. P. Pogose.....109,113

C

C. Chinna Simadiraj *v.* the Zemindar of Vizianagaram..... 2
C. Bysaik and another *v.* H. Dossee and C Dossee.... 38
C. C. P. Vencatachella Redyar *v.* C. C. M. Vencatachella Redyar..... 76
C. Ramakrishnama *v.* C. Soobamah.....35,39
Calathy Pillay *v.* Ella Pillay.....235,280,303
Canaka Krishnum *v.* K. Cottavapa..... 115
Catayee *v.* Namasevoya Pillay..... 67
Chabila Manchand *v.* Jadavbai..... 188
Chandrabhagabbaye *v.* Kasenath Vital.....35,47
Chalakonda Alasani *v.* C. Ratnachellum.....236,280
Chellama *v.* Yellappah..... 177
Chenkaren O. C. Akmond *v.* N. Mookhtar..... 250
Chetty C. C. Vencatachella Redyar *v.* R. R. Streemunth Iyengar Bahdoor 117
Chetty C. Prussunna *v.* Chetty C. Moodoo..... 214
Cheydulol *v.* Mt. Sunja Terwarim..... 244
Chinnapiel *v.* C. Shewagaren.....214,218,241
Chotun Beebee *v.* Ameer Chund..... 13
Chowacaren P. P. Mossa *v.* V. P. Coonjy Fatima... 212
Chowcaren O. C. Ahmood *v.* N. Mookthar.....211,250
Chowdree Purmessa Dutt *v.* Hunoman D. Ray..... 70
Chowdry Padam Singh *v.* Koer Udaya Singh..... 93
Chuckun Lall Sing *v.* Poran C. S. Roy..... 195
Chinna Gounden *v.* Kumara Gounden.....71,73,75
Chunda Kant Surmah *v.* Bungsideb Surmah..... 296
Chundro Tara Debia *v.* Buksh Ali..... 177
Chundoo Kedawoo *v.* T. Kelloo Coorpoo..... 241
Chuoturya Run Murdun Syn. *v.* Sahub Purhulad Syn.....7,49,50
Civa Rau Nanaji *v.* Jevana Rau and others..... 116
Collector of Tirhoot *v.* N. Hurro[illegible]ad..... 70
Collector of Masulipatam *v.*

PAGE.

C. Vencata Narainapa.. 206, 207
Comul Moonee *v.* Joggopaul 303
Collydossee Dossee *v.* Chunder Suker Bistoo..... 37
Comara *v.* Permall..... 202
Conniah Chetty's son (by Grdn :) *v.* Extrs: of Conniah Chetty's will..... 114
Coomarasawmy Moodly *v.* Sellumall..... 35
Coonjee Mudduck *v.* Ramkissore Podar..... 12
Coonwar Bodh Sing *v.* Sheonath Sing..... 240
Coopumall *v.* Rookmany Ammal..... 34
Cosserat *v.* Sudaburt Pershaud.....201,219,220,244
Cotay Hejaday *v.* Manjoo Kumpty..... 76
Crabb *v.* Crabb..... 140
Crastnarao Wassadewji *v.* Raghunath Harichandarji and another.....62,92
Culloor Narrainsawmy In-Re. 131
Cundasamy Pillay *v.* Maroodinaygam Pillay 198
Cunjhunnee and B. Dosse *v.* Gopeemohun Deb and another 45

D

D. Bungaroo Ummall *v.* Zemdr. of Calastre.....34,48
D. Narayan *v.* J. Nargaloo... 37
D. P. Buttacharji *v.* Omalata Lahoree and others 94
D. Royaparaz *v.* Mullupudy Rayadu and others.... 27
Dabee Sing and others *v.* Bujroo Sing and others 118
Dabychurn Mitter *v.* Radachurn Mitter..... 9
Dada B. Ruttenjee *v.* Nimwoo..... 241
Daee *v.* Motee Nuttoo.....62,101
Dagdubin Daud T. Pardeshi *v.* Shekh S. V. Badruddin Kamble..... 122
Dagumbaree Dabee *v.* Taramoney D. Masa..... 70
Daharoo Sooklain *v.* Court of Wards..... 173
Damodhur V. Karee *v.* D. Hari Somana.... 209,215
Danapa Bin Subrao In-Re... 118
Datti Parisi Naidoo *v.* Datty B. Naidoo..... 50
Debee Pershad *v.* Phoot Koeve..... 275
Debee Dial *v.* Hur Hor Sing. 73
Deel Singh *v.* Mt. Gunshun Kowur.....38,45
Deela Sing *v.* Toofanee Sing. 187
Deoputtee Koonwur *v.* Dhumoo Lall..... 120
Deokoonwur *v.* Umbaram Lala..... 10
Deva Rau *v.* Venkatasa Achariyar..... 166
Dhun Kishen Roy *v.* Hurro Chunder Roy..... 162
Dhunookdharee Lall *v.* Gonput Lall.....174,239,282
Dhun Sing *v.* Dowlut Sing. 290
Dhurm Chund Shatea *v.* Raj. M. Debia.....177,178
Dhurm Doss Pandy *v.* Mt. Shama S. Debia..95,145,177, 148,157,173,175
Divi Virasalingum *v.* Alaturti Ramaiya..... 8
Doe Dem Juggomohun Mullik and others *v.* Saumcoomar Beebee and others..... 5
Doe Dem Kissen Chunder Shaw *v.* Baidam Beebee 14,62
Doe Dem Kullamall *v.* Kuppu Pillai..... 26
Doe Dem K. S. Takoor *v.* Beebee Munee..... 69
Doe Dem Brijogopee Dabia *v.* Seebrosoondery Dabee.. 114
Doe Dem Bhobannypersaud

PAGE.

Boyee *v.* Teerpoora-churn Mitter.....115,117
Doe Dem Mongooney Dossee *v.* Gooroopersad Bose... 116
Doe Dem Tillack seal *v.* Gour Hurry Day.....145,147
Doe Dem *v.* Roberts..... 165
Doe Dem Ramasamy Moodelly *v.* Vallatah... 183,277
Doe Dem Sacaram S. *v.* Laxumbai.....199,210
Doe Dem Jaggomohum Roy *v.* N. Dossee..... 215
Doe Dem. Ramnaut Seat *v.* Bulram Chunder,241,262,297
Doe Dem Goulchunder Mitter *v.* Yarachurn Mitter..... 276
Doe Dem. Raja of Seebkristo *v.* E. I. Cy..... 276
Domun Sing *v.* Kasee Ram and Toolsee Ram.....242,275
Dookeah Dossee *v.* R. B. Mazoomdar 99
Dorasinga Taver *v.* the Ranee of Shivagunga and her son..... 11
Dosari Kolappa *v.* Dosari Suba Chetty..... 308
Dossee Monee Dossee *v.* Ramchund Mohur.....178
Duljeet Sing *v.* Sheomunook Sing..... 295
Dulwan Rai *v.* Akbar Rai.... 308
Durbaree Sing *v.* Salegram. 308
Durgopal Singh *v.* Roopun Singh..... 70
Durma Samoodhany Umall *v.* C. Vencatchella Redyar..... 82,95,102
Duttnarain Sing *v.* Ujeet Sing..... 100
Duyashunker Kasseeram *v.* B. Moteechund..... 294
Dwarkanath Soor *v.* Goonomonee Debia.....243, 250
Dyaram Doolubh Baee Umba..... 11
Dyer *v.* Dyer.....140,146

PAGE.

E

East Doe Dem G. Banerjee *v.* B. Banerjee..... 213
Ebrand *v.* Dancer..... 146
Edathil Itti *v.* Kopashon Nayar..... 211
Elavambadoo Mootiar *v.* E. Nineappah Moodly 184,213, 240
Elder Widow of Rajah Chutter Sein *v.* Younger widow.....270,286
Elliot *v.* Elliot..... 146
Erapah *v.* Ackamah..... 243
Eshanchund Rai *v.* Eshorchund Rai.....215,233
Eshan C. Banerjee *v.* N. Coomar Banerjee..... 292

F

Futteh Bahadoor *v.* Jankee Bibeh..... 297

G

G. *v.* K..... 11
G. Yettarazamah *v.* G. R. Venkata Charloo..... 25
Gadijee Ragavenhapah *v.* Ambati P. Subbaiya.... 189
Gane Bivi Parab *v.* Kane Bivi..... 177
Gangabaikum Sidhappa *v.* R. b. Bhimanna..... 223
Ganhapatti Venkataramana *v.* S. Ruchayia..... 189
Garuda Vencata N. Sunneassy *v.* G. Jugganaikoolee 106
Gaurama *v.* Devaka 116
Garuda Venkaya *v.* Garuda Reddi..... 209
Ghansham Kumari *v.* Govind Sing 235
Gobind C. S. Mazoomdar *v.* Anand Mt. S. Mazoomdar..... 97
Gobind Soonduree Debia *v.* J, Debia and others 99

PAGE.

Gobindnath Sein *v.* Gobind Chunder Sein..... 177
Goburdhun Nath *v.* Onoop Roy and others..... 23
Gokoolanund Rai *v.* Soonder Narrain Rai..... 177
Golamee G. Gose *v.* Juggessur Gose..... 2
Golaub Koonwarree Beebee *v.* Eshan C. Chowdry117,125
Golinknath Bose *v.* Rajkissen Bose..... 242
Goluknath Bose *v.* Rajkissen Bose..... 190
Gomarata Amby *v.* Mengutteson and others..... 100
Goondoo Mahadeo *v.* R. b. Baboobhut...198,199,209,214
Gooropershaud Rai *v.* Mussummut Jymala.....78,81
Gooroo Churn Sircar *v.* Kylash C. Sircar..... 124
Gooroopershaud Ray. *v.* D. Pershaud Tewarree....191,306
Goorumconda Raumaurau *v.* Y. Yellumnaidoo..... 199
Goor Surren Doss *v.* Ram Surrun Bhukut.....224,241
Goorochurn Doss *v.* Gooluckmooney Dossee..... 303
Gopaul Singh *v.* Dhungazee 14
Gopal Chànd Pandey *v.* B. Kunwar Sing.....214,228
Gopaul C. Daghoria *v.* K. Daghoria..... 252
Gopal Row Pàndoorung *v.* Rama Bee..... 275
Gopal Das Sindh *v.* Nurotum Sindh..... 292
Gopeekrist Gosain *v.* Gungapersaud Gosain.....134,174, 187
Gopee Churun Burral *v.* Mt. L. Ishwurree Delia. 241,250
Gopemoyen Deb *v.* Raja R. Kissen..... 102
Gorroopersaud Baee *v.* Seebchunder Bose..... 295

PAGE.

Gosain Chund *v.* M. Kishenmunnee and another...24,25
Gosaeen Stree C. Bahojee *v.* Girdarajee..... 93
Gour Chunder Rai *v.* Hurish Chunder Rai.....145,177,234
Gour Persaud Pershaub *v.* Sheo Persaud Ram 123
Goureenath *v.* Coll. of Monghyr..... 198
Gour Chunder Biswas *v.* Grush Chunder 201
Gouree Sunker Roy *v.* Anund Mohun Mitter..... 298
Govindoss Dhoohebdas *v.* M. Luksheemee..... 240
Govinda Oodian *v.* Alamaloo 268
Gowerbullub *v.* Juggernatpersaud Mitter..... 101
Grey *v.* Grey.....140,146
Gudadnur Serma *v.* Agodhearam Chowdry..... 170
Gudadnur Serma *v.* Ajodhearam Chowdry.....170,292
Gun Joshee Malkoondkur *v.* Sugoona Baee..... 24
Gunga Deen Rawut *v.* Modhoo Surrum..... 230
Gungoo Mull *v.* Bunseedhur 232
Gunnapa Deshpandee *v.* Sunkapa Deshpandee..... 77
Guru Das Dhar *v.* Bijaya Gobinda Baral..... 213
Guru Prasad Roy *v.* Nafar Das Roy and another ... 24

H

Hammucka *v.* Rungapah.... 25
Harasundari Guptha *v.* Nabagobind Sen..... 42
Hari Mahadaji Joshi *v.* Vasudev M. Joshi..... 113
Harkishwar Chanduri *v.* Ramdual Lushkar..... 124
Head *v.* Egerton..... 207
Heera Lall *v.* Mussumut Koasillah..... 33
Hemanginee Dossee *v.* Jogen

PAGE.

dro N. Roy..... 159
Holman *v.* Johnson..... 164
Hookum Chund Beyhanee *v.* French..... 125
Hoymobutty D. Choudrain *v.* Karoona. M. D. Choudrain..... 32
Hur Sookha *v.* Poorun.... 13
Hurree Bhayee *v.* J. Keeshoodass..... 28
Huradhun Mookurjia *v.* M. Mookurjia and others 59,84,93
Hunoomanpershaud Panday *v.* M. Baboosee Munraj Koonweeree.....120,121 122,123,194,199,201,203
Hurbut Rao Manker *v.* Govind Rao B. R. Manker 87
Hurbajee Raojee *v.* H. Trikundass..... 244
Hurdwar Sing *v.* Luchmun Sing... 275
Huree Kussun *v.* Runchor .. 224
Hurka Shunkar *v.* Raeejee Munohur..... 8,12
Hurnarrain *v.* Gobindrain... 280
Hurodoot Narrain Sing *v.* Beer N. Sing..... 215
Hurree Ram *v.* Jeetun Ram. 120
Hurree Lal Chowdry *v.* K. M. Dabia..... 215
Hurroo Lal Chowdry *v.* Kripa M. Deebee..... 233
Hurrosoonderry D Chowdry *v.* Rajessuree Debia..... 297
Hurrurai *v.* Pulwan Sing..... 307
Hurreehur Mookerjee *v.* Nobeen K. Banerjee..... 188

I

Ilata Shavatri and another *v.* I. Narayanam Numbudri..... 37,48
In-re Hurabuthe..... 34
Inderun Valungapooly Taver *v.* Ramasamy Pandia Talaver and another.... 8,49
Indra Narrain Sing *v.* Tulri N. Sing..... 213
Issur Chunder Bonerjee *v.* Nund C. Bonerjee... ... 297
Iswhur Chunder Surma *v.* Brijonath S. Chowdry... 118
Ittapen *v.* T. Mattu Manadi. 212
Iyagaree Soobaroyadoo *v.* Iyagaree Sashama... ... 39
Iyatora Chetty *v.* Mootia Taver..... 101

J

J. Rayacharlu *v.* J. Venkataramaniah..... 230
Jadumani Dasi..... 42
Jagganada Row *v.* Kondarow 278,283
Jaggomohun Bukshee *v.* Roy M. Chowdry...,..... 187
Jai Ram Dhami and others *v.* Musan Dhami..... 85
Jameeyut Lall *v.* Huqeequt Rai..... 291
Jamoonauh Raur *v.* Mudden Day..... 243
Jadubchunder Ghose M. L. G. *v.* Benadbeharry Ghose..... 253
Janki Dibeh *v.* Sudasheo Rai and another..... 93
Janki Sing *v.* Bakhari Sing. 213
Janokee Dossee *v.* Kisto Komal Sing..... 187
Jenintum Ammah *v.* Chooliappadiatchy..... 283
Jigumony L. Chowdry *v.* Fuqurooden M. A. Chowdry..... 124
Jivanee Bhayee *v.* Jhiva Bhayee..... 67
Jivan Lall Sing *v.* Ram Govind Sing.....214,221
Jokhoo Ram Pandy *v.* Muttra Persad Pandy.....274,275
Jowahir Sing *v.* Chundernarrian Rai 125
Jowahir Sing *v.* Gunyan Sing..... 230

PAGE.

Jowala Buksh *v.* Dharam Sing..... 241
Joymonee Dabee *v.* Takur Chund Chuckerbutty... 279
Joynarrain Sing *v.* Roshun Sing 221
Judalkon Ranchod Mulji *v.* Hira Mulji..... 46
Judoonath Tewaree *v.* Bishonath Tewaree... 275,290,297
Jugdel N. Suhayee *v.* Lall R. Prokash..... 225
Juggessur Hati *v.* Deobo Moyee Dossee... 113
Juggut Chunder Sein *v.* Kisshwanund... 286
Jyaka Pari *v.* Jusava Pari... 300

K

K. Jagganada Row *v.* K. Teeroomulrow..... 40
K. Ragaveeyah *v.* K. Venkyah..... 39
K. Venkatarama Sastrulu *v.* Bramana Sastrulu 189
Kaipreta Ramen *v.* M. Mutoren..... 210
Kaithe *v.* Kulladasi Kaundan 5
Kalayanessure Dabee *v.* Dwarkunath S. Chatterjee..... 38
Kallati K. Menon *v.* P. Erracha Menon 211
Kalipersaud Sing *v.* Kupoor Koowaree..... 34
Kalee Doss Chatterjee *v.* Beharee L. Mookerjee.. 117
Kalee Mohun Paul *v.* Bolanath Chakladar..... 159
Kaleepershund Roy *v.* Digumber Roy 170,234 240,280
Kalee Doss Neogee *v.* C. Rai Chowdry... 214,233
Kallupnath Singh *v.* Kumlaput Jah..... 114
Kalika Sahoy *v.* Gouree Sunkur.....190,191

PAGE.

Kumulmani Dossi *v.* Bodhnarayanan Mujmooadar42,47
Kamakshi Ummall *v.* Chidembra Reddi..... 128
Kanukurty C. Narsinga Row *v.* K. Vencataramdoss Puntooloo and others... 130
Kantoo Lall *v.* Greedharee Lall..... 214
Karasoo Numbiar *v.* Government..... 14
Karteik Surdar *v.* Neeranjum Juleea..... 213
KasheShuree Debia *v.* Greesh C. Lahoree..... 32
Kashee Chunder Mustofe Petitioner..... 38
Kashul Chukemuth *v.* Radhanath Chukemuth 170
Kasheepershaud *v.* Bunseedhur..... .....
Kashee L. Shastrulu *v.* P. Buchireddy... .....
Kattama Nauchiar *v.* Zemindar of Shivagunga 174
Kataparoomal Pillay *v.* Senkara Pillay..... 214
Kattapermali *v.* Punchanaden Pillay 242
Katama Nauchiar *v.* Srimut Odiya Taver..... 278
Keratnarain *v.* Mt. Bhobineesree 65
Kesabram Mohaputtur *v.* Nandkishore Mohaputtur..... .....
Khanakasabhaiya Pillay *v.* Seshachala Sastri... 216,
Khelut Chunder Ghose *v.* Koonj Lall Dhar..... 176
Khemia Debia *v.* K. Kunt Bukshee..... 242
Khetramani Doss *v.* Kasinath Doss 40
Khoderam Serma *v.* Tirlochun.....185,291
Khunnya Pandee *v.* R. D. Pandey..... 308

PAGE.

Kirtnaraen Das *v.* Rajkoomer Rai..... 274
Kishen Komul Sing *v.* Janokee Dossee 187
Kishnanund Chowdry *v.* M. Rookunnee Debia 47
Kishore Munee Dossee *v.* Sreekunt Sen.....179,240
Kishori Lal *v.* Chaman Lal.. 182
Kistnyengar *v.* Sreenavassyengar..... 194
Kistniengar *v.* Vurdyengar. 242
Kisto Chunder Kurmokar *v.* Rughonath Kunkur... 175
Kondi Menon *v.* S. Ahamadda 210
Kollath P. M. Koran *v.* P. M. C. Nair..... 212
Koober Khansama *v.* Jan Khansama..... 13
[illegible] M. Dabia *v.* T. C. Chuckerbutty.....37,42
[illegible]up Narrain *v.* Rajbunsee Kowur 118
Koomaree Dabea *v.* Gresh Chunder Lahoree 32
Koomud Chunder Roy *v.* Setakanth Roy 48
Koonj Beharee Dutt *v.* Kitthurnath Dutt 175
Koonla Khant Ghosal *v.* Ram H. N. Gramee..... 215
Koonwar Bijoy K. R. Bahadoor *v.* Shamasunduree Dossee..... 291,297
Koonwar Bodh Sing *v.* Sheonath Sing..... 240
[illegible]shul Chuckerwutty *v.* R. Chuckerwatty... 236,291, 306
Kottala Uppi *v.* Shangara Varma..... 243
Koulnath Sing *v.* Jagrap Sing..... 240
Kripa Sindhu Patjoshi *v.* Kanhaya Acharya... 303,306
Krishnyengar *v.* Vanamamalay Iyengar..... 68
Kullammal *v.* Kuppu Pillai... 27

PAGE.

Kullar Sing *v.* Modhoo Dyat Sing.....199,200,229
Kullean Sing *v.* Kirpa Sing and Bholee Singh..... 62,70
Kulponath Dass *v.* Mewah Lall..... 275
Kumani Amma *v.* Parkam Kolusheri 211
Kumlakant Chuckerbutty *v.* G. Chowdry 214,295
Kummoroodeen Shaik *v.* Sheik Bhadoo..... 115
Kumvagata *v.* Arranjaden. 43,210
Kunya Lall *v.* Bukhtawar Sing..... 243
Kuppamal *v.* Punchanauda Iyen..... 268
Kurusetti Bhama *v.* Kurusetti Kamaiya. 276
Kuta Bully Virayah *v.* K. C. Vuthamulu.....252,273

L

Labar B. E. Sanamby *v.* V. Coonhy Pucky..... 209
Lachchanna *v.* Bapamana..... 32
Lakhi Priya *v.* Bhairab Chandra Chawduri and another..... 4
Lakhun C. Dallal *v.* M. Moockhee Dossee....177,184
Lallah Boodmull (father and grdn. of Lekraj Sing, minor) *v.* Lallah Gowree Shunker..... 119
Lallah Bunsudheer *v.* Konwur B. Dutt Sing....123,124
Lalla Mohabur Pershaud *v.* Mt. Kundun Koowur. 173,274
Lalla Beharee Lal *v.* Lalla Modho Pershad.....181,187
Lalla S. Narrain *v.* Lallah Modho Pershaud..... 202
Lalla Sreepersaud *v.* Mt. Akoonjoo Koonwur..... 274
Lamplug *v.* Lamplugh..... 146
Lar Baee *v.* Teharam Gopal 240
Latchmenada *v.* Visvanada... 194

PAGE.

Linga Mulloo Pitchama *v.* L. M. Gooruppah... 189,299
Lokenath Surma *v.* Ooma Moyee Debia..... 178
Luchmi Ummall *v.* Gonagu Anda Naick..... 46
Luchman Doss *v.* Rup. Chand..... 113
Luchmen Sing *v.* Bibee Miriam 117
Luchmun Kaour *v.* Mudaree Lall..... 194
Luchmana Baligay *v.* Atchama 268
Luchman Joharimal *v.* Bapu Kandu..... 250
Luchmee Narrain Chuckerbuttee *v.* Taramoney Debee..... 163
Luchomun Persad *v.* Debee Persaud..... 295
Luchoomen Sing *v.* Kazemally and others..... 125
Luckhee Priya Dassee *v.* Nobinchund Nag..... 127
Luckinarain Sagori..... 80
Luckhun Chunder Dallal *v.* Modho Mockhee Dossee.....177,178
Lutchmy Koonjy Umma *v.* E. E. Keshawoony..... 189
Luximon Row Sadasew *v.* Mullar Row Bajee. 145,169

M

M. Anundmoyee *v.* Sheeb Chunder Roy..... 77
Mt. Belas Koer *v.* Baboo B. Bukth Narrain Sing ... 188
Mt. Bhoorun Koer *v.* Sahebzadi 202,204,214
Mt. Bona Koeri *v.* B. Boolee Sing..... 213,236
M. Bheloo *v.* Phool Chund. 35,42,45
M. Chourassee *v.* K. Bukul and another..... 47
M. Chellakonda Alasam *v.* C. Ratnachellum and others 77

PAGE.

Mt. Cheetha *v.* Baboo Miheen Lall..... 174,188
M. Doorga Konwar *v.* M. Teejee Konwar..... 24
M. Deon Koer *v.* Sunghum Singh..... 32
Mt. Dullabh De *v.* Manu Bibi 65, 76,81
Mt. Deepoo *v.* Goureeshunker..... 71
M. Day *v.* O. Day and another.....78,93
Mt. Deo Bunsee Koer *v.* Dwarknath..274,277,297,307
Mt. Dhurputtu *v.* Haradhun Sircar.....299,303
M. Golab Koonwur and others *v.* Colltr. of Benares and others... ...34,133
Mt. Goolab *v.* Mt. Phorl..... 188
Mt. Hoobat Konwar *v.* Man Sing..... 307
Mt. Joraon Koonwar *v.* Chowdree D. Dowun Sing..... 188
Mt. Jasoda Koonwar *v.* Gouree B. Sahae..... 191,270
Mt. Jumeelun *v.* Wullee Amhed..... 242
M. Jeomooney Dossee *v.* Attaram Ghose..... 295
Mt. Joymunnee Dibia *v.* Fakeer C. Chuckerbutty... 295
M. D. Kumarasamy Moodly *v.* D. Ramalinga Moodly 287
M. A. Lakshminarsu Puntulu *v.* Totagopiah..... 166
M. Mookerjee *v.* Jadub Chunder Banerjee..... 4
M. Monhurrun Korwar *v.* Thakoorpersaud..... ... 34
M. B. Moyee Debia *v.* Ram Kishore A. Choudry. ... 79
M. Narasammall *v.* Balarama Charloo..... 65,68,69
Mt. Nowruttun Koer *v.* B. Gouree Dutt Sing..... 203
M. Rajaram and another *v.* Govind Rutunjee..... 28

PAGE.

M. Ramasawmy Aiyar *v.* Meenatchee Umall... ... 47
Mt. Raj Koonwar *v.* Mt. Dhunkoonwar... 296
Mt Roopna *v.* Roy Reotee-Rumun..... 221
M. Sinthajee *v.* Pondily Hooran and another 45
Mt. Solukona *v.* Ramdolal Pandee and others...78,81,97
Mt. Shibo Koeree *v.* Joggun Singh..... 70,85,101
Mt. Sutpathe *v.* Indranund Jha... 70
Mt. Soobhedhar Dossee *v.* Boloram Dewan..... ... 177
Mt. Toofah and others *v.* Tussonda..... 13
M. Thakoor Deebee *v.* Rai Baluk Ram and others. 23,29
M. Tara Munnee *v.* Dee Narain..... 84,102
M. Vencatakristniah Puntaloo *v.* M. Ratnhavanatamah..... 39
Mt. Vato Koer *v.* Rowshun Sing..... 274
Maharanee Ram Causi Koeri *v.* Maharanee Subh Koeri..... 3,4
Maharanee Bussunt Komaree *v.* M. Kumul Komaree. 37
Maharajah Govindnath Ray *v.* Gulal Chund and others. 86
Maharanee Bussunt Comaree *v.* Bullobded...... 145,147
Maharajah J. Sahee Deo *v.* H. R. Chukerbutty..... 209
Maharana Fatesangji *v.* D. Kalyanraya..... 283
Maharajah M. Buksh Sing *v.* Mt. Gunoon Koowar.... 286
Maharaj Hetnarain Sing *v.* Modnarain Sing..... ... 308
Maha Sorkh *v.* Budree... ... 234
Mahatab Chund *v.* Mirdad Ali..... 280
Mahipat Sing *v.* Collector of Benares..... 240
Mahomed Oomur *v.* Pirthee Sing..... 307
Manavicrema Nalam Raja *v.* S. Puttar..... 212
Manikamal *v.* Chitumbara Dikshadar..... 279
Manna Pillay *v.* Amoravati 157
Manuckchund Premchund *v.* Mt. Premkoonwur..... 29
Mantena Rayaperaj *v.* C. Vencataraj..... 250,276
Manuckchund Purbhoo *v.* D. Tooljaram..... 244
Maruda Padayachi *v.* Vera Padayachi..... 275
Mayavanjari Chumaren *v.* N. Mayuran..... 211
Meelkisto De Burmono *v.* Beerchunder Takoor.... 286
Meenatchee *v.* Chedumbra Chetty..... 304
Mirtinjai Bose In-Re..... ... 126
Modhoo Soodun Manjee *v.* Dabee G. Newgee..... 114
Modho Dyal Sing *v.* Gobur Sing..... 225
Mohesh Chunder Banerjee *v.* Sreemutty B. Dabee..... 166
Mohunt Kalumper K. Doss *v.* M. Jagmohun Doss... 279
Mohunt Gopal Das *v.* Mohunt K. Doss..... 279
Moniatta In-Re... 114
Monohur Roy *v.* Mohummed Saib Ali..... 188
Moodoosooden Sing *v.* Colltr of Midnapore..... 194
Moodookrishna Naick *v.* Tandavany..... 115
Mookaoond Misr *v.* Kusyabroojah..... 231
Mooktakeshee Debia *v.* N. C. Buttacharjee..... ... 243
Moonshee Buzloor Ruheem *v.* Shums-oonnissa Begum 13
Moonean *v.* Moonesawmy Moodelly..... 120

PAGE.

Moonayee Surmah *v.* Lomun Surmah. 173,188
Mooneyen *v.* Moottun 306
Moothoosawmy Tagavira Yathapa Naikan *v.* Vencatasubha Yettia 7,49
Mootia Moodelly *v.* Uppen Vencata Chary. 66
Moothoosawmy Naidoo *v.* Lutchmydavummah. ... 66
Mootoosawmy Gaunden *v.* Soobramanya Gaunden. 190
Mootoocoomaroo Tayer *v.* Caroopayee..... 278
Mootoo Vencatachella S. Maneyagar *v.* M. Maneyagar 283
Mootoovencatachella S. M. *v.* Toombyasamy M..283,298
Mopur Ademah *v.* Damavarapee Subba Reddy..... 178
Mortiali *v.* Chinniah.... 166
Morun M. Debia *v.* B. Kishto Gossamee... 69,101
Motee Lall *v.* Mitterjeet Sing 214, 233
Mothoor Chunder Kurmokar *v.* M. Chunder Bungo... 297
Muddun Mouhn Shah *v.* Bharut C. Roy..... 160
Muddun Gopaul Thakoor *v.* Ram Buksh Pandy..206,225, 234,240
Muhoon Missr *v.* Kunyah Ojah..... 213
Mumma *v.* Mumma..... 146
Munda Chetty *v.* Timmaju Hensu 44,77,295
Mun Mohinee Deebia *v.* Soodamoonee Debia.....187,189
Mun joonadhay Baligay *v.* Atchama... 268
Murless *v.* Franklin.....140,146
Murikancherri K. Ahamed *v.* C. P. Avulla., ... 212
Mushal Sing *v.* Yadult. 188
Mussumet Doorga Koomar *v.* Khunya Lall Awasti..... 25
Mussumut Himulta Choudrain *v.* Mt. P. Munee Chowdarin 42
Musst. Meejhoo and others *v.* Mukhoond Sahoo 13
Muttammall *v.* Kamatchi Umall..... 37
Muthoora Koonwaree *v.* Bootun Sing 227
Mutusamy Gounden *v.* Subramanya Gounden..... 292
Mynee Boye *v.* Ootooram ... 193
M. J. Yettapa Naicken *v.* Vencatswara Yetapa..... 50

N

Nagapah Redapah *v.* Suba Chastry..... 77
N. Soobaroyadoo *v.* Dodda Chennoogadoo..... 178
Nagalinga Moodelly *v.* Subrimonya Moodelly.287,292,298
Nagapa Nynaur *v.* Meedundee Swara Nynaur...268,273
Nallapa Reddi *v.* Balamal.... 127
Nallatumby Chetty *v.* Mookoondoo Chetty..... 287
Namasavayam Pillay *v.* Annammai Ummall..... 2
Namriatten Nambudri *v.* N. Nambudri..... 210
Nana Narrain Rao *v.* Hurree P. Bhas..... 234
Nanu Bibee *v.* Shajah Surwer Hoossein..... 126
Narayana Chetty *v.* Parvatumall..... 47
Narasimall *v.* Balarama Shaster.....68,262
Narayna Reddy *v.* Vedachella Reddy..... 83
Narayen *v.* Tumberatty... ... 115
Naragunty Luchmidavummah *v.* Vengama Naidoo 174,177,279
Narasimhara Krishna Row *v.* A. Virupaksh..... 244
Narrasumall *v.* Ragavendra Charree..... 4

PAGE.

Narraina Iyengar *v.* Veeraragavah P. Iyer..... 179
Narrayan Ayyar *v.* Lukshmi Ammal 270
Nathoo Lall Chowdry *v.* Cheedee Sahee..... 209,223
Naunkissen Mitter *v.* Mootoosunderee Dossee..... 295
Nayalram Atmaram *v.* Nandkishore Shivnarayen and another..... 23
Nazuku Bibi *v.* Charles Culpepper..... ... 117
Neelkaunt Rai *v.* Munnee Choudrain.....295,302
Nellore Narasah Reddy *v.* N. Lukshmakka.....268,278
Nibmadhab Das *v.* Biswambhar Das and others...83,93
Nilmoonee Banerjee *v.* Surbo M. Debia..... 179
Nirunjun Sing *v.* Parsaud Sing..... 307
Nocoor Bysaik *v.* Gopul Chund Seal..... 113
Nowbut Sing *v.* Durbane Sing..... 229
Nowab Rai *v.* Buggawathe Koowur 83
Nub Koomar Chowdry *v.* Jye Deo Nundee.242,190,241
Nubkishwar Biswas *v.* Ramjoy Ghose..... 243
Nubkissen Mitter *v.* Hurischunder Mitter.....279,298
Nufur Mitter and Rujeeb Mitter *v.* Ramkoomer Chutoorjya..... 24
Numbala Krishnama *v.* the Maharajah of Vizinagram 50
Nundlall Bhungwandoss *v.* Tapeedoss and another 2
Nundram *v.* Kashee Pande 72,73,220
Nundhoosoodhun Sing *v.* Coll: of Midnapore..... 126
Nundun Lall *v.* Taylor..... 159
Nunkoo Lall *v.* Mt. Sohodra. 118

PAGE.

Nurat Syud A. Khan *v.* Sreenurchund D. Mahajun... 118
Nursamal *v.* Mathewa Charry 308

O

O'Donnell *v.* Maha Rajah Buddinauth..... 114
Ologappah Chetty *v.* Collector of Madura..... 246
Ondy Kadaron *v.* Arnachella Kadron..... 88
Oojal Munnee Dassee *v.* Jygopaul Chowdree..... 39
Oojoodya Pershad Sing *v.* Ramsaran; 224,225,234
Oomed Rai *v.* Heera Lall.....121,208,243
Ooman Dutt *v.* Kunhia Sing. 70
Oomras Singh *v.* Mt. M. Koonwaur 51
Oonoomallay Ummall *v.* Caroonay Ummall..... 157
Ootumrams and another *v.* Mt. Bhanee and another 125

P

P. Bachiraju *v.* Venkatappadu..... 22
P. Chellapermal Pillay *v.* Veerapermaul Pillay... 192
P. S. Nhayada *v.* Rama Luchmana 47
P. Venkatesaya *v.* M. Vencata Charloo 65
Palanivelapa Kaundan *v.* Mannaru Naiken... 125,209, 224,230
Palaniyappa Chetti *v.* Armugam Chetty... 157
Pandaiya Telaver *v.* Puli Telaver..... 5
Pasibhut Sahoo *v.* Radha Kishen Sahoo..... 163
Papamal *v.* Ramasawmi Chetty..... 10
Parrakel Kondi Menon *v.* V. Kunni Penna..... 210
Pearee Lall *v.* Bukhoree Lall 177
Peary Lall *v.* Bhawoot Koer. 188

PAGE.
Peddamuthulatty and others v. N. Timma Reddy 116
Pedru Prabhu v. Domingo Prabhu..... 180,212
Peer Buksh Khan v. Ram Doss..... 230
Penauka Paty v. Appayangar 294
Permal Naick and another v. Pothee Umall and others..... 71,102
Permessur Ojah v. Mt. Goolbee..... 114,116
Pershad Sing v. Ranee Muhesree..... 49
Poolunder Sing v. Ram Pershaud..... 123
Pootumall and another v. Goolam Russool & others 95
Poovathay v. Paroomal... ... 298
Prankishen Singh v. Mussumaut Bhagwutee...19,24,29
Prankishen P. Chowdry v. Mootooramohun P. Chowdry.....174,252
Prankishen P. Chowdry v. M. Paul Chowdry 252
Prankissen Mitter v. Sreemutty R. Dossee.....262,268
Pramaten Tupen Nambudripad v. M. Ramen..... 211
Prannath Rai v. R. Govind C. Rai..... 97
Prannath Doss v. Calishunker Ghosal 198
Prasunna Rauze v. Kistnama Rauze..... 307
Prasnamayi Dasi v. Kadambini Dasi..... 97
Pratab Narrain Doss v. The Ct. of Wards... 214,215
Preag Sing v. Ajoodya Sing. 103
Pritima S. Choudrain v. Anand C. Choudry..... 93
Pullen Sitty Nagoo v. S. Kristnadoo..... 37
Pullyar I. N. v. Andoyenum. 106
Pully Kundy Muckey v. Pully K. Koonjoossa..... 194
PAGE.
Punchanund Ojha and others v. Lalshan Misser and others..... .. 24
Purappavanalingum Chetty v. Nullasevan Chetty... 166
Pursuram Deo v. Sree C. Anunga Deo 48
Purtab Bahauder Sing v. Telukhdaree Sing...170,178, 279,280
Purwathy Ummall v. Maynumall..... 35
Pussam Sahoe v. Randeen Lall..... 230
Putabnarrain v. Opindunarain..... 295

R

Radachurn Rai v. Kishenchund Rai..... 306
Radakishen v. Sreekishen ... 268,274
Radho Dyal Sing v. Gobbur Sing..... 232
Radhika Pershaud v. Dhurm D. Debia..... 177
Radkey v. Baboo B. Persaud. 230
Ragava Charry v. Seenummall 37
Rahmed Beebee v. Rokeya Beebee 12
Raisham Bullub v. Prankissen Ghose.....36,42
Raj Roop Sing v. Buldeo Sing..... 244
Rajah B. V. Luchmana v. Rajah B. N. Naidoo..... 34
Rajamunani Dossee v. Sitchundra Mullick..... 41
Rajah Shumsheer Mull v. Ranee D. Konwur...71,73,84
Rajah Upendra Lal Roy v. S. R. Prasaunamay..... 73
Rajah Haimun C. Sing v. Koomer G. Sing..... 84
Rajkristo Roye v. K. M. Mojoomder.....97,107
Rajan C. Bungaroo Mootoorauzoo v. Peruma and

PAGE.

others..... 124
Rajah of Burdwan *v.* Ram Jadub Ghose..... 124
Rajah Kishennath Raee *v.* Ram Lal Mookerjee 127
Rajnarrain Roy *v.* Juggernath P. Mullick..... 160
Rajkishor Rai *v.* Widow of Santoo Doss..... 184
Rajkoomar B. Sing *v.* Sookhnandan Koowar 179
Rajaram Tewaree *v.* Luchmun Pershaud...199,205,223
Rajah Bydianund *v.* Jydutt Jah..... 213
Rajah of Nobkipens..... 215
Rajeram Tewari *v.* Luchman Persaud... 200,205,223
Rajhmohun Gossain *v.* G. Gossain..... 240
Rajah Suraneny L. Venkama Row *v.* R. S. V. G. Narsima Row....269,294,296
Rajah Lelanund S. Bahadoor *v.* Gt. of Beng:..... ... 279
Rajah Sooranany Venkatapputty Row *v.* Rt. Ramchendra Row... 282
Rajah Baidyanund Sing. *v.* Sudranund Sing ....., 291
Rajah Ram Tewarry *v.* Luchmun Persaud... 294
Rajoo *v.* Buddun 286
Rakhal Doss Moduck *v.* Bindoo B. Debee..... 160
Rajjomoney Dossee *v.* Subchunder Mulluk..... 36
Ram Lochan Shaha *v.* Unoopoorna Dossee 241
Ram Autar *v.* Ram Jas and others..... 117
Ram Dyal Ghose *v.* Amrithall Khamarro..... 126
Ram Golam Debey *v.* Ayma Begum..... 243
Ram Joshi A. B. Joshi *v.* Laxmibai R. M. S. Joshi ... 296
Ram Kannye Gossamee *v.* Murnomoyee Dosse..... 297
Ram Lall Teranee *v.* Chuttur Teranee..... 215
Ram Lekraj Singh *v.* Goorysunker..... 118
Ram Soonder Sandial *v.* Rajah A. Roy..... 160
Ram Tahul *v.* Madho and others..... 13
Ramasami Padeiyatchi *v.* Virasami Padeiyatchi .. 25
Ramanini Umall *v.* Colunda Numbiar..... 49
Ramanamall *v.* Suban Annavi 67
Ramalinga Pilly *v.* Sadasiva Pillay.....70,262
Ramayee Hussa Bhiee *v.* Shakoor Rao Bhidi..... 87
Ramanuja Charryar *v.* Vencatasvara Iyengar..... 117
Rama Row *v.* Rajah Row.... 116
Ramasheshaiya Panday *v.* Bhagavat Panday..... 188
Ramakuti Aiyar *v.* Kulaturaiyen.....199,215,216,218
Ramasamy *v.* Sasachella. 209,213, 215,217
Rama Pillay *v.* Srirangam Pillay..... 214
Ramasawmy Reddy *v.* Vencatamah..... 268
Ruman *v.* Vadamalay... 283
Ramasheshiah Panday *v.* Bhagavat Panday 291
Ramachundra Dada Naik *v.* Dada M. Naik..... 295
Ramchendra Rauze *v.* Sons of Veeraragava Rauze... 283
Ramchundra Dikshit *v.* Savitrabai.....35,46
Ramchunder Rauze *v.* Sons of P. Mulrauze... 279
Ramchunder Roy *v.* Rajah Udwant Sing... 279,286,287
Ramchunder Taranee *v.* Mt. Jasooda Koonmunee....
Ramchuwer Taranu *v.* Mt. Jasooda Konmum..... 33

PAGE.

Ramdulol Sircar *v.* S. M. Joymoney Dabey..... 26
Ramen Nayar *v.* Kandapuni Nayar..... 211
Ramen *v.* Cooty Pandyanche 96
Ramgunga Deo *v.* Doorgamunee Sabraj..... 278
Ramiah *v.* Kantaya..... 199
Ramien *v.* Condumal..... 32
Ramkishen Surkeyl *v.* Ms. Sri, Mutee Debia.....96,97
Ramkissen Sing *v.* Rajah S. Nundun Sing..... 273
Ramkoomar N. Bachesputtee *v.* K. T. Bhosun.....233,215
Ramlal Thakursidas *v.* Lakmichund Muniram 295
Ramnad Adoption case..69,84,86, 88,89,94,95,107
Rampriya *v.* Bhriguram..... 38
Rampershad Tewarry *v.* Sheochurn Doss..45,174,236
Rampershud Sookool *v.* Rajender Sahai..... 120
Ramrutun Sing *v.* Chunder Narain Rai..... 282
Ramtoonoo Mullick *v.* R. Mullick..... 215
Ranee Kishen Munee *v.* Rajah Oodwunt Singh..... 70,96,97
Ranee Sevagamy Nachiar *v.* Streemathoo H. Gurbah.....65,76
Do. do. *v.* Zemdr. of Ramnad.....83,92
Ranee Mormoonkunee *v.* Ramnarain Doss..... 93
Ranee K. Debia *v.* K. Debia and another..... 93
Ranee Roshun Jhan *v.* Rajah S. E. Hossain.....114,123
Ranee Hurroosoondery *v.* C. Kishonath Roy..... 114
Ranee Bhowanee Dibeh *v.* Ranee Soorujmunnee'... 295
Rangayian *v.* Kalyam Ummall..... 39
Rani Pudmavati *v.* Baboo Doolar Sing..... 290
Rankunhaee Rai *v.* Bung Chund Bunhoojia..... 213
Ravee Vurma *v.* Cherrikul Chenga V. Vurma..... 282
Ravoory Krishniah *v.* R. Panakaloo..... 234
Rawut Urjun Sing *v.* Rawutt G. Sing..... 278
Rayan K. Chariar *v.* Kuppen Iyengar..... 100
Razu Monee Dossee *v.* Puddum Mokkee Dossee ... 299
Reg: *v.* Karsan Goja..... 13
Reg : *v.* Bai Rupa..... 13
Regina *v.* Anderson..... 132
Reg. *v.* Sharpuzi Bezonji..... 132
Reg. *v.* Rev. Robert Nisbet. 132
Reg. *v.* Dr. Duff..... 132
Renjomoonee Debia *v.* Rajcoomar Beebee..... 33
Rennie *v.* Gunga N. Chowdry.....114,115,159
Rewun Pershaud *v.* Mt. Radha Beebee ..188,269,273, 276,297,306
Rhamdan *v.* Bhattacharji..... 42
Rugnath Misser *v.* Sheik Churag..... 307
Rungamah *v.* Atchama 268
Runganaigum *v.* Namasevoya Pillay..... 67
Rushbohany Lall *v.* Roy Goury Sunker..... 159
Rutton C. Shooree *v.* S. Hurreemoonee 35,40

S

Sabo Beeva and another *v.* Nahagun Maiti..... 64
Sadabart P. Sahu *v.* Foolbask Koer,..207,209,219,245
Sahib Z. M. Sing *v.* Rampersaud Chowdree..... 225
Saik Moortey Doss V. Doss *v.* Pellay Chetty..... 195
Sakaram Trimbak *v.* Ranu W. V. Appajee..... 49

PAGE.

Sakarat Alvan *v.* Narayanasami Alvan..... 115
Sakhwat Hosen *v.* Trilok Sing..... 198
Sakwarbai *v.* Bhavanjee Rajee G. Z. Deshmuck..... 34,45
Samy Iyen *v.* Iyavien.... 234
Saroda Mohun Roy Chowdry *v.* Shama S. Dossia..... 159
Sarabiah *v.* Mulliah..... 294
Sasachella *v.* Vencatachella..... 202,213
Saundary Ummall *v.* Kamatchi Ummal..... 178
Sawmy Josyen and others *v.* Ramien..... 83
Seebchunder Bose *v.* Goorooopersaud and Bose..32,45,125, 127,299,302
Seenawasa Chetty *v.* Colletta Chetty..... 236
Seetamah *v.* Kamatchumah.. 34
Seenivassa Iyengar *v.* Kuppen Iyengar..... 100
Seevagamy Nauchiar *v.* Zemindar of Ramnad..... 177
Sengamalathammal *v.* Valaynda Mudali..... 17
Senkel Sevan *v.* Aralunda Ambalaharan..... 81
Seshyia *v.* K. Kandayia..... 164
Shaik Ootioolah *v.* Mt. Asseran..... 242
Shaikh Ruttun *v.* K. Shupan..... 211
Shamchunder *v.* Narayna Debeh..... 78,81,101
Shama C. Chatterjee *v.* T. Mookerjee..... 202
Shamsundari Debi *v.* Ahilyia Dai Debi..... 42
Sham Sing *v.* Mt. Umraottee. 214
Shecoram Ghose *v.* Dattaram Ghose..... 159,179
Shee Chunder..... 127
Sheikh Bahauder Ali *v.* Sheikh Dhomun..... 146
Sheo Persaud Ram *v.* Thakoor Pershaud..... 122

PAGE.

Sheopersaud Jha *v.* Gungaram Jah.....127,200,214
Sheo Ruttun Koonwar *v.* G. B. Bhukut..... 177,223
Sheo Surrun Misser *v.* Sheo Sohai.....213,214,220
Sheo Shurn Lall *v.* Jumun Lall..... 214,221
Shoo Suhaye Sahoo *v.* Sreekishan Sahe..... 214
Sheopersaud Sing *v.* Kulunder Sing..... 291
Sheo Dyal Tewarree *v.* Bishonath Tewarree.... 297
Sheo Dyal Tewarree *v.* Judoonath Tewarree...295,297, 303,306
Sheobkush Sing *v.* Futtih Sing..... 298
Sheo Doss *v.* Mt. Longee. 308
Shib Dyal Tewarree *v.* Bishonath Tewarree..... 290
Shibnarrain Bose *v.* Ramneedhee Bose.....179,276
Shiu Golam Sing *v.* Baran Sing.....177,181
Shivagunga Case..... 173,177, 234,240,307
Shudanund Mohaputhur *v.* B. Doss Mohaputtur.... 191
Shunker Lall *v.* Mt. Rohmer Koonwur..... 273
Shunker Sing *v.* Baboo B. Suboy..... 125
Shurnoo Moyee Dossee *v.* Gopal Lal Doss..... 38,42
Sibasundra Davy..... 42
Siddesory Dossee *v.* Doorga Churn Sett..... 64
Sidmouth *v.* Sidmouth... 140,144
Singamma *v.* Ramanuja Charlu..... 52
Sinthayee *v.* Pondily Oodeyan 45
Sirdun Pandee *v.* Soogreem Pandee..... 188
Sitaramiyar *v.* Aligiry Iyer 292
Sivarama Casia Pillay *v.* Bagavan Pillay..... 5
Sivapoorya Pillay *v.* Naga-

PAGE.

linga Pillay..... 71
Siva Chilumbra Pillay *v.* Parasuity..... 76
Sivamiyar Pillay *v.* Chokalingum Pillai..... 127
Somengowda B. D. Gowda *v.* Burmungowda.. 189
Sonatun Bysaik *v.* S. Juggutsoondree Dossee. 32,191,307
Sooboo Goorookul *v.* Tagoo Umall and Camato Umall..... 47,102
Sonpamallee *v.* Mootoocomaree Pillay..... 88
Soobamall and another *v.* Sooboo Chetty... 47
Soobra Pillay *v.* Condasawmy Pillay..... 88
Soobah P. Lal Jah *v.* Soobah D. Lal Jah..... 115,118
Soobah D. Lal Jah *v.* Rajah Nulamund Sing 115,118
Soobuns Lal *v.* Hurbuns Lal. 178
Soobputten *v.* Juggamiah Acharry..... 231
Soobramanya Pillay *v.* Paroonelliappa Pillay . 241,242
Sooba Naiken *v.* Taugaparoomall Pillay..... 268
Soodasun Sain *v.* Lockenauth Mullick..... 12
Sookinah Banoo *v.* Hurroo Churn Burrey..... 120
Soondur Komaree Debia *v.* G. Pershad Tewarree...92,96
Soopaloo Umall *v.* Veerasawmy Iyen and others. 87
Soorodhuny Dossee *v.* Bissumbhur Sircar... 117
Sootrungun Sutputty *v.* Sabitra Dye..... 56,63,84,92
Sreemutty C. M. Dossee *v.* Joykissen Sircar..... 25
S. M. Jeeomoonee Dosee *v.* Attaram Ghose... 32
S. Soorjeemunnee Dossee *v.* Denabundoo Mullick 34,174
S. Raja Row B. Tummiah *v.* S. R. V. Neeladry Row. 38

PAGE.

Sree Mootee M. Dabee *v.* Joynarain Puckrassee 32,45
Sreemutty Joymony Dossee *v.* Sebasoondry Dossee. 57
S. Siddeny Dossee *v.* Doorgachurn Sett & others 63,78
Sreemutty Shamasoondery Dossee *v.* K. Churn Mitter..... 291
S. K. Boochee Venkiah *v.* S. K. Chinna-A Rauze. 65
S Joymoney Dossee *v.* S. Sibosoondry Dossee... 72,73
Sree B. Maharaj *v.* Sree G. Maharaj 76,86,87,102
Sreemutty Dossee *v.* Tarachurn Coondoo Chowdry 78
S. M. Dossee *v.* Tin Cowry Nundy..... 84
Sree K. Bungar Rauza *v.* S. K. V. Gopala Rauza.. 106
S. Ranee Shorbharmohee *v.* S. R. Bromohobee... ... 118
Sreemutty S. Dossee *v.* Deenobundo Mulluk 174,234
Sreeram Venkatasobhia *v.* Venkataramaya..... 189
Sreeram Ghose *v.* Srenath D. Chowdry..... 187
S. M. Rungamani Dossee *v.* Kaunath Dutt..... 197
Sreenarrain Beera *v.* Gooroopershad Beera... 236,303
S. Nullatumby Chetty *v.* R Mookoondoo Chetty. 224
Sreenarrain Rai *v.* Bhya Jha 30,101
Srimati Sukhimani Dasi *v.* Mahendranath Dutt.186,253½
Sri Gajaputty Hari Krishna Devi Garu *v.* Sri Gajaputty Radhika Patta Maha Devi Garu... 8
Srinath Gungopadhya *v.* Sarbamangala Debi... 29 and 30
Srinarayan Mitter *v.* Srimati K. S. Dasi... 64
Srinath Serma *v.* Radhakaunt..... 100,101,282

PAGE.
Stileman *v.* Ashdown..... 146
Stree Rajah Y. Venkayama *v.* Stree R. Y. B. Venkondara..... 280
Stree Rajah R. G. N. Deo *v.* Stree V. R. G. Naraina.. 284
Subbaluvamall *v.* Amakutt Ummall..... 83
Subu Hegadu *v.* Tongu..... 42
Sundarayan *v.* Sitamarayan.. 124
Subrahmanya Modelly *v.* Parvati Umall..... 101
Subbiah *v.* Rajaswara Sastralu..... 307
Subarayadu *v.* Gopavajula Ramana..... 218
Subhadra Dasi *v.* Balaram Dewan..... 182
Sudanund Mohapatter *v.* Bonomalla and others.78,101
Sudanunda Serma *v.* Ramchunder Dutt..... 213
Sudanund Mohapatter *v.* Mussmut S. Dabee...78,191, 291
Sumboo C. Choudry *v.* Narain Dibeh..... 101
Sumrun Sing *v.* Khedun Sing..... 299
Sumbhoolall Girdhurlall *v.* Coll: of Surat..... 283
Sundanund Mohaputtur *v.* S. M. Dayee..... 179,232
Sundara Pillay *v.* Tegaraja Pillay.....216,218
Sundramurti Moodelly *v.* Vallinayaki..... 214
Syed Gholam Hossain Alley *v.* Satur Khan..... 124

T

T. Chatterjee *v.* D. Banerjee 27
T. Jugganadarow *v.* T. Vencatacoondulrow..... 268
Tahul *v.* Madho and others 13
Talwar Sing *v.* Puhlwan Reddy..... 298
Tandavaraya Mudali *v.* Valli Ummall....209,122,194
Tandavaroya Gounden *v.* T. Gounden..... 231
Tara Churn Mookerjee *v* Joy Narain Mookerjee.. 191
Tara Chund Ghose *v.* P. Lochun Ghose.....250,253
Tara M. Buttacharjee *v.* K. Moyee Debia.....101,103
Tarini Charan Choudry *v* Saroda 90,107
Tarmoomah Rau *v.* Muddun Day..... 243
Taylor *v.* Taylor..... 140
Tegnarrain Mullich *v.* B. Mullich..... 234
Temmakal *v.* Subammal.124,299
The King *v.* C. Kistnama Naick..... 1,41
The Queen *v.* Ogilvie..... 131
The King *v.* Greenhill.... 131
The sons of Veeraraga Mulrauze *v.* R. Rauze... 240,304
The E. I. Company *v.* Syed Ali. 240
The Secretary of State for India *v.* Kamachee B. Sahata.....278,283
Tiakandy Chatten *v.* K. Ramen Nair..... 211
Tickany Ramalutchmy *v.* T. Teroomalaroyadoo... 38
Timmanah *v.* Vencapah.. 244
Timmappa Heggade *v.* Mahalinga Hegade..... 279
Timmi Reddi *v.* Achama 268, 306,307
Tippasoor Vencatacondulrow *v.* T. Jugganadarow.....268,298
Tirhoot Sheo S. Sahoo *v.* S. Sahee..... 220
Totakot S. Menon *v.* Kurusingul K. Varid..... 248
Tottacara M. M. N. Numboodripad *v.* P. M. T. Numboodripad.. 101
Totun Bee *v.* Ameer Chund 13
Towers and Davis..... 207
Trilochun Roy *v.* Kishen

PAGE.

Kishen Roy..... 187
Trimbuck Anunt *v.* Gopalshet B. M. Mahadeo.194,209
Turcapah *v.* Mullashiah 294
Tylammal *v* Ragopaty Iyen 242

U

Ujalmani *v* Joy Gopaul Chowdry..... ... 42
Ukanda Varriyar *v.* Ramen Nambudri..... 211
Umacharan Choudry *v.* Nitambini 42
Unnopoorna Dassea *v.* G. Narrain Paul 243

V

Vaduli Ramakristnama *v.* Manda Appiya..... 123
Valayooda Pillay *v.* Chedumbara Pillay..... 218,241
Valayuda Gounden *v* Kuppanan..... 268
Varadiperumal Udayian *v.* Ardanari Udayian...225,234
Vassareddy case 59,62,64,78,82, 102,107,115
Veerasawmi Chetty *v.* Appasami Chetty... 8,9,11,14
Veerabudra Chary *v.* Kuppamall..... 35
Veeraperamal Pillay *v.* Narrain Pillay. 53,65,72,73,76, 83,84,88,93,95,99,106
Veerasawmy Graminy *v.* Ayasawmy Graminy216,219, 223,230,241
Veerappen Servacaren *v.* Brunton.....241,242
Veera Gounden *v.* Datta Gounden 268
Veeranah *v.* Vencatapah. 279
Vencatasawmi *v.* Vencataramen Pillay..... 88
Vencatareddy *v.* G. Sooboo Reddy..... 178
Vencata Soobamal *v.* Venkummall..... 295
Vengum Manic Thaken *v.* Ramgunga Deo..... 278

PAGE.

Venkatasubah Pattar *v* Giri Ummall..... 117
Venkatakrishnyengar *v.* Narayen.....193,242
Venkopadaya *v.* Kavari Hengusu 45
Veraprashyia *v.* Santaura-ja..... 78
Verbadera Hurryhudree *v.* Baiee Ranee..... 84
Virakumara Servai *v.* Gopaul..... 76
Visvanath Gangadhar *v.* Krishnaji Ganeish..... 253
Visvanada Naick *v.* Bungaroo T. Naick..... 279
Vithoba Bava *v.* Hariboo Bava..... 291
Vrishapati A. Shewchurnram *v.* A. Kurtaram. 303
Vudda Ballaram *v.* S. V. Venkamah..... 35
Vulliah Ummah Raja *v.* C. O. Vurmah Raja..... 115
Vydealingum *v.* Mooneachilly..... 113

W

Widow of Macundoss Vahibdoos *v.* G. Gopenath... 213
Wooma Soondeeree Dossee *v.* Dwarkanath Roy.158,303
Wulubrham Oomayashunker *v.* Bijlee..... 28

Y

Y. Chinna Bassapah *v.* Y. Gowdapah..... 83
Yejnamoorty Seetaramiah *v.* C. Lutchmenarsoo... ... 300
Yekeyamian *v.* Agniswarian 231,299,300
Yergaludda Ramasawmy *v.* G. Lukshmana..... 115
Yettiraj Ammah *v.* Tayamal 268 306
Yerrumah *v.* Sinjevoo 247

Z

Zeebunsal *v.* Hurbuns Lal and Reeder Ram..... 170

ERRATA ET CORIGENDA.

Page.	7	Col.	2	Line	31	for	'how or succeed,' read, 'inherit.'
,,	27	,,	2	,,	40	for	'altercation,' read 'alienation.'
,,	28	,,	2	,,	15	for	'living,' read 'leaving.'
,,	86	,,	2	,,	8	for	'no,' read 'on.'
,,	89	,,	1	,,	7	for	'of', read 'or.'
,,	41	,,	1	,,	7	for	'therefore', read 'therefrom.'
,,	49	,,	2	,,	16	for	'to', read 'as to.'
,,	61	,,	2	,,	2	for	'son the', read 'the son.'
,,	61	,,	2	,,	6	after	'will', read 'on the part of the adopter.'
,,	61	,,	2	,,	11	for	'permitted', read 'qualified.'
,,	68	,,	1	,,	19	after	'if,' insert 'the.'
,,	71	,,	1	,,	11	for	'invalid', read 'valid.'
,,	85	,,	2	,,	45	for	'on', read 'in.'
,,	114	,,	1	,,	39	for	'twenty five', read 'twenty one.'
,,	130	,,	2	,,	29	for	'goal', read 'jail.'
,,	132	,,	1	,,	31	for	'discresion', read 'discretion.'
,,	186	,,	1	,,	12	after	'acted', insert 'on.'
,,	218	,,	1	,,	37	for	'P. C.,' read 'I. A.'
,,	295	,,	1	,,	41	for	'elder,' read 'holder,'

THE KING v. C. KISTNAMA NAICK.

1814.

2. STRANGE'S NOTES OF CASES, P. 89.

If a Hindu neglects to provide a husband for his daughter in time, he loses the right to dispose of her in marriage.

A *Habeas Corpus* had been obtained by the father of a young girl (a Hindu), upon an affidavit, stating that she was in the custody of his half-brother, who proposed giving her away in marriage, contrary to the will of the Deponent. On the return, it appeared that the girl was about fourteen years of age, and that, for seven or eight years previous, she had been living with her uncle, the Defendant, and this, till lately, with the consent of her father, who had placed her with him, not being himself in very good circumstances. That the habits of the father were of the worst kind, being addicted not only to women, but to drinking also, a thing unusual among the Hindus; and that his purpose, if he could get possession of his daughter, was to marry her to a low man, of illegitimate birth, having been promised a sum of money as a consideration.

Having consulted *Pundits*, and looked into *Menu* (*a*) upon the subject, it appeared to the Chief Justice that the father had forfeited the right he had to dispose of his daughter in marriage, by allowing her to remain so long unprovided with a husband.

The girl being of an age to judge for herself, she satisfied the Chief Justice that her residence with her uncle was with her free will; that her desire was to continue with him, dreading nothing so much as to go back to her father; and the Judge had reason given him to apprehend that, should her father succeed in his object, she would put an end to her existence.

Under these circumstances, he told the father that he must relinquish her, as he had indeed already done, for a great length of time; and she went back in charge of her uncle, accompanied by her grand-mother on the mother's side; who confirmed by her testimony the account given of the father, and the expediency of her being allowed to remain with her uncle.

(*a*) Menu. Ch. IX. 90. 91 and 93.

It is proposed to consider in connexion with this case, marriage, as regards the contract; wife's power to contract: supersession, and divorce; re-marriage; and restitution of conjugal rights.

Marriage; Contract of—Marriage is [redacted]aluable, and not only a good consideration: *C. Chinna Simadiraj* v. *the Zemindar of Vizianagram and others.* 2 Mad. H. Ct. Rep. p. 128. (*a*) No marriage contract is valid, unless the consent of the *parents* of both contracting parties has been obtained. *Nundall Bhungwandoss* v. *Tapeedoss and another.* 1 Borr: 14. ib. 1. Mor. Dig. p. 287 §. 1. The right of giving away his daughter in marriage rests with the *father*: but he may delegate his authority to another. Such delegation may be presumed from his conduct. So in *Golamee G. Gose* v. *Juggesseerur Gose.* 3. Sutherland p. 193, (East Burdwan) it was held that where a father gave his daughter, an infant, to another, left her with him till the proper time arrived when a husband ought to have been provided for her, allowed the Plaintiff to marry her, and had done nothing to impeach the validity of the marriage for four years, his delegation must be presumed. The right of *Wagdan* (for the meaning of this term Vide 2. Str. H. L. 61. (54, 1st ed.) Abbé Dubois' India p. 137. and VII. Asiat. Res. p. 288.) has reference to that part of the marriage ceremony where the father of the bride, joining the hands of the bride and bridegroom, says, "I give this virgin to you for a wife." The right of betrothal of a girl, and marriage of her after, belongs to her relations in the following order.(*b*) In the first instance, to the father. If the father be dead, the successor to his wealth, or other competent person must give her in marriage. (2. Cole. Dig. 113. 3rd Ed.) This decision is based on a text of *Yajnyawalcya* referred to differently in 2. Str. H. L. 22. and in 2. Cole. Dig. 303. Strange merely notices the relations who have the right to give away. Colebrooke indicates those also who have the right to be consulted. If the father be not living, then the paternal grandfather; failing him, the brother of the girl; if she have no brother, her paternal uncle; in default of such relation, her male cousins on the same side; and, ultimately, her mother. *Anon*; *Broach* Court of Adawlut; January 25, 1812. 2. Str. H. L. p. 22. It does not appear from the report of this case whether the family were divided or not. See. 2 Macn. p. 204. In Sp. A. 514 of 1868, *Namasavayam Pillay* v. *Annammai Ummall*, before the Madras High Court, the question of priority of right to give away a girl in marriage arose, as between the mother (a widow), and her husband's *divided* brother. There, the Plaintiff, a divided brother of Defendant's deceased husband, claimed an exclusive right to give in betrothal the infant daughter of his deceased brother, and to have a sum of money paid to him by the Defendant for the expenses of the marriage. The High Court decided against the claim. Both the Courts below

(*a*) Vrehaspati I. Dig. B. II. Ch. IV. S. II. V. 49.
Nareda I. Dig. B. II. Ch. IV. S. II. V. 50.
Vyvahara Mayuka. Ch. IX. 6.

(*b*) Yajnyawalcya.
II. Dig. B. V. Ch. III V. 135.

had rejected the plaintiff's claim. On appeal, a text of *Yagnyawulkya*, given in 2. *Sir T. Strange*, p. 28 and Cole Digest B. V. Ch. 3. S. XXXV, was relied on. There, the order of succession in which the right to nominate a bridegroom prevails is distinctly given. But the Court held that the mother's right was nevertheless not excluded. They argued that the texts rested on the right of advice and consultation, with which the dependent state of the widow invested the male relations; but that the natural right of the mother, as guardian, to nominate her daughter's bridegroom, was not excluded. The Court found as follows :—

"Upon reason and principle therefore, and the application of the existing law in regard to the independent position of the defendant, both as guardian and proprietor of the estate derived from her husband, we come to the conclusion that the law does not warrant a declaration of the absolute right set up by the plaintiff, we are of opinion that the duty was enjoined on the husband's kinsmen in order to ensure the making of a suitable provision for the betrothal of daughters before reaching the age of puberty, just as it is declared to be their duty, in the case of sons, to provide for the several ceremonies required to perfect the regeneration of a twice born man. It appears to be so treated by *Jaganatha* in the *Digest, secs.* 303 *and* 113 ; and that they were left to perform it like all other auspicious family ceremonies, in harmony, if possible ; with the mother and other members of the family. If on a choice being made of a person in every way suitable to be affianced, a mother, without sufficient cause, improperly refused to accept him, and obstructed the betrothal, a suit to compel her to allow the ceremony to take place, and, if she was chargeable, to provide means for its celebration, would probably be successful. But no Court, we think, would be justified in granting such relief if the mother's refusal and resistance were because of serious objections to the person chosen, or for other good and sufficient cause, nor we think would the betrothal of a daughter with an unobjectionable person of the mother's selection be restrained at the suit of the brother or other kinsmen of the father, who had been consulted by the mother, and had without any sufficient cause objected to the betrothal. It would seem from the express provision made by the law for the choice of a husband by a girl herself, in case of neglect on the part of her relatives of their duty to betroth her, for 3 years from the time she became marriageable, *Menu ch* : *IX sl* : 90, 91, 1 *Strange's Hindu Law* 36, that the duty does not amount to an enforceable legal obligation, and the effect of restraining the betrothal in such a case would probably be to aid in thwarting betrothal before puberty, the very purpose for which the duty was enjoined. We do not find in the cases which were referred to in argument anything to assist the decision of the present question, except the recognition of the right of the grandmother as guardian to dispose of a minor daughter with the consent of her male paternal relative, expressed in the judgment of the court in *Maharanee Ram Causi*

Koeri. v. Maharanee Subh Koerie. Wyman's Civ. and Rev. Reports Vol. 3. p. 224, which certainly favors our view of the plaintiff's claim. For these reasons the decree appealed from must be affirmed and the appeal dismissed with costs."

In *Maharani Ram Causi Koeri* v. *Maharanee Soobh Koeri,* 3. Wyman, p. 219, S. C. 7. Sutherland p. 321. it was held that the guardian of a girl's person is not necessarily the person to dispose of her in marriage. Both rights may sever; though they may unite and centre in one and the same person. See the order in which a girl's relations are entitled to dispose of her in marriage, 2. Macn. p. 204. In default of father or mother, the grandmother (guardian) has the right of disposing of her ward in marriage, *with the consent* of the girl's paternal male relations. A mother, living her son, has no right to give away her daughter in marriage. It devolves on him. *Narrasumall* v. *Ragavudra Charree*; 2. Str. H. L. p. 23. A *Kolin* Brahmin, with numerous wives, is not so properly the guardian of his daughter, as the mother. When, therefore, his daughter had married, with consent of her mother only, and the father sued to annul the marriage, on the ground that he had not consented, the marriage was held valid. *M. Moorkijee* v. *Jadub Chunder Banerjee.* 3. Sutherland. p. 194.

There are several cases to be found in *Borrodaile* on this point of consent, but as they affect only particular sects, they are not of general authority; and therefore not noticed here. *Vide* 1. Morl. Dig. p. 287 et. seq. A marriage once solemnized by the ceremonies of *Wagdan* and *Saptapadi* can never be set aside, although irregularly contracted by the mother, without the consent of the father. *Baee Rulyat* v. *Jeychund Kewul.* Bellasis, 36. ib. I. Mor. Dig. N. S. p. 181. Where the betrothment has been accompanied by delivery of a sum of money as part of the *Pulla,* or bridal presents, it is irrevocable. A girl can only be betrothed once; *sed quære, Lakhi Priya* v. *Bhairat Chandra Chanduri and another.* 5. Beng. S. D. A. R. 316: unless indeed the first betrothal falls through for sufficient reason, such as disease, bad conduct of the man, and the like. Broach Ct, of Adalut. Sept. 6. 1811. 2 Str. H. L. p. 27. (a) But a betrothal in the *Ausoora* form is not irrevocable until the money is paid. 2. Str. H. L. p. 28. *Broach* Ad. Ct. (b) Presents given by the boy's father, or family, to the father or family of the girl, must be returned, if the marriage falls though. 2. Str. H. L. p. 29. *Broach* Ad. Ct. (c) Where a marriage is not proceeded with, from the appearance of bad auspices, the presents must be returned. 2 Str. H. L. p. 30. *Broach* Adt. Ct. A promise by a father to give his daughter in marriage may be enforced at law.

(a) Menu. Ch. IX. 71.
Yajnyawalcya II. Dig. B. IV. Ch. IV. S. III. V. 176.
Vasishta. II. Dig. B. IV. Ch. IV. S. III. V. 178.
Mit. Ch. II. S. XI. 26. and 27.

(b) Menu. Ch. III. 31.
Yajnyawalcya II. Dig. B. V. Ch. IX. S. II. V. 499.
Nareda II. Dig. B. IV. ch. IV. V. 177.

(c) Mit. Ch. II. S. XI. 28 and 29.
Vyvahara Mayuka Ch. IV. S. X. 33.

2 Str. H. L. 31. (c) Words of consent suffice to make a valid marriage. Ceremonial observances are immaterial. *Doe Dem Juggomhurr Mullik and others* v. *Saumcoomar Beebee and others.* No. 31. East's N. of C. Ib. 2 Mor. Dig. P. 45. (b) Although *Menu* lays down eight species of marriage, four of which, the *Brama, Daivha, Arsha,* and *Prajapataya,* are appropriate for Brahmins; *Ghandarva* and *Rachsasa* for Cshatryas; and *Ausoora* for Sudras; it has been held, that these rules are rather recommendatory than imperative; and that a Soodra may contract a *Brama* Marriage. (c) *Sivarama Casia Pillay* v. *Bagavan Pillay.* R. A. 193 of 1858. Mad. S. R. for 1859, page 44. The *Ausoora,* or purchase form, is now the most common; and it is frequently practised even by Brahmins. A marriage will not be pronounced to have been of an improper form, in the absence of proof. *Kaithe* v. *Kulladasi Kaundan* Sp. A. 50. of 1860. Mad. S. R. for 1860, page 201. The four *classes* recognised by Menu, are the *Brahmins, Cshatryas, Vysias,* and *Soodras*; and not the numerous subdivisions of these classes introduced in the progress of time; per *Holloway J*: *Pandaiya Telaver* v. *Puli Telaver.* I Mad. H. Ct. R. p. 484. (d) A Hindu, of a class governed by the *Schatriyas,* may contract a valid marriage with the daughter of a bastard; for the Hindu law, independent of special usage or custom, does not make illegitimacy an absolute disqualification for caste; so as to affect, not only the bastard, but his children. It cannot therefore be said that the daughter of a bastard is of *no* caste, and as such, immarriageable:—Ib. *Semble*; A *Sudra* need not marry a woman of the same caste as himself:—Ib. In this case *Scotland* C. J. said, "We will, assuming the marriage proved, express our opinion as to whether it was in Hindù law a disqualification invalidating the marriage. What the Civil Court appears upon the authority of the pundit's opinions to have decided, and the defendant has contended is, that illegitimacy of the father placed him without the pale of the caste of his parents, and consequently his daughter (the second plaintiff) *was destitute of caste*; and that a valid marriage could not take place between the late zamindar (he being of a caste that conformed to the Castras) and a woman of no caste. In the view I take of the law it is unnecessary to make a distinction somewhat refined, and which would at all times be very difficult to ascertain, between a caste of *Cúdras* conforming in all respects to the *çastras,* and one that did not so conform, as was pointed out with some effect to be the case with the caste of the late zamindar. There appears to be no satisfactory ground for the proposition that as respects either caste, the Hindù law, independently of special usage or custom, makes illegitimacy an absolute disqualification for caste, so as to affect in the relations of life not only the person who is illegiti-

(a) Yajnyawalcya. II. Dig. B. IV. Ch. IV. S. III. V. 176.
Catyayana. Ii Dig. B. IV. Ch. IV. S. III. V. 180.
Mit. Ch. II. S. XI. 26.

(b) Menu. Ch. III. 35. Ch. V. 152. Ch. V. III. 227.

(c) Menu. Ch. III. 20. to 26.

(d) Menu. Ch. I. 31.

mate, but also his legitimate children. Nothing in the way of authority, except the detached passage referred to by the *pundits*, has been adduced; and that passage standing alone cannot be accepted as an authority to that extent. It has been taken, we find, from amongst several other merely directory passages on the subject of personal appearance and form, to be found in the work of *Vaidyanàtha* on marriage, and does not appear to have any specific or particular application. I am, further, not aware that any authority can be found for the proposition; and on principle and reason, looking to the rights of property possessed by illegitimate persons, the law would appear to be otherwise. The Hindù law does not, like the English law, consider an illegitimate person *quasi nullius filius*. It recognises his relationship to his father and family, and secures him substantial rights. Under the ancient law it seems, that at one time in the case of the three superior or "regenerate tribes," sons not born in lawful marriage had rights of inheritance subsidiary to the "*Aurasa*," or son by a lawful wife, and could perform obsequies. *Menu* chap. 9 cl. 159, 160, 180: *Mitàkshará*, chap. 1 sec. 11; 2 *Strange's H. L.* 194-211; and although this, as a general law applicable to those tribes, has, in respect of inheritance, become obsolete; yet it is clear law at the present day, that by birth, and without any form of legitimation, illegitimate children of those tribes are recognised as members of their father's family, and have a right to maintenance. It is also equally clear, that in the case of *Cúdras*, the law has been and still is, that illegitimate children succeed their father by right of inheritance. *Mitàkshará*, chap. 1 sec. 12: *Strange's H. L.* i. 132. Whilst such is the law as to family *status* and rights of an illegitimate child, it would be anomalous and inconsistent that illegitimacy should be declared to be a taint and disqualification for the membership of caste in the individual and his children. Further, so to decide in this case, would in effect be giving to illegitimacy, as a disqualification, an operation which it would be contrary to the spirit, if not the letter, of legislative enactment, (see Act No. XXI of 1850) to allow to degradation from caste. For these reasons, I think that, assuming the illegitimacy of her father, the second plaintiff was not placed in a different position as regards marriage, from that in which she would otherwise have stood; and apart from this question of illegitimacy, the evidence as already observed, shows that the parties were of different divisions of the same *Maravar* caste. I am consequently of opinion that the marriage was valid, and the first plaintiff therefore the legitimate son of the late zamindar. It is not, however, to be understood, that supposing the late zamindar and the second plaintiff had been of different castes, the marriage would in my opinion have been invalid. The general law applicable to all the classes or tribes, does not seem opposed to marriage between individuals of different sects or divisions of the same class or tribe, and even as regards the marriage between individuals of a different class or tribe,

the law appears to be no more than directory. Although it recommends and inculcates a marriage with a woman of equal class, as a preferable description, yet the marriage of a man with a woman of a lower class or tribe than himself, appears not to be an invalid marriage rendering the issue illegitimate. *Manu* chap. III, cl. 12 *et seq*: *Mitáksh*: chap. I sec. 11 cl. 2, and note: 1 *Strange's* H. L. p. 40. According to this view of the law, there being no proof of special custom or usage, the marriage would be valid even though the parties had been of different sects, or caste-divisions, of the fourth or *Soodra* class."

Holloway J. said—"I have never entertained the least doubt that the argument for the invalidity of the marriage, drawn from the alleged illegitimacy of the woman's father, is altogether unsound. That the son of a *Soodra* and of a woman, between whom there has been no formal ceremony of marriage, inherits to the *Soodra*, is clearly shown by the authorities quoted at page 49 of the seventh volume of *Moore's* Indian Appeals; and the decision of the Judicial Committee, that the illegitimate son of a *Cshatriya* could not inherit, went precisely upon the ground that the father was one of the twice-born tribes. The whole tenor of the judgment shews, that if the father had been a *Soodra*, the son's right to inherit would have been unquestionable.

"In the Hindu Law books there is a distinction drawn between the son of a slave and the son of a concubine. The son begotten by a Soodra on a *female slave* obtains a share by his father's choice, or at his pleasure; but after the demise of his father, he shares with his legitimate brothers; and if there be no issue, he takes the whole estate. The son of a regenerate man by a female slave is simply entitled to maintenance. Mitac. C. I. S. XII. All the authorities, with the exception of Jimuta Vahana, refer only to the son of a female slave; he adds "or other unmarried Soodra women." A. C. IX Cls. 29 & 31. *Jimuta Vahana* cites the text of *Yajnyawalcya*, but imports into it the words "other unmarried Soodra woman." No authority is cited for the importation, and no commentator of reputation supports him. Strange, H. L. I, 69, and 187, 2, 68, 69 and 71, notices the subject, but does not draw a distinction between the sons of female slaves and the sons of concubines. *Macnaghten* however clearly does, and shows that although the illegitimate son of a female slave by a Soodra may succeed to his father, and his son by an ordinary concubine has no right to inherit, but can only claim a maintenance—2. Macn. 15. These observations of *Macnaghten* have been referred to apparently with approbation by Sir *Edward Ryan* in *Chuoturya Run Murdum Syn* v. *Sahub Purhulad Syn*, VII Moore's. Ind. App. p. 49. Again in 2 Macn. 241, Case 34, it is shown that a concubine and a female slave are differently regarded by Hindu law. In *Moothoosawmy Jagavira Yathapa Naikan* v. *Vencatasubha Yettia*, 2 Mad. H. C. R. 293, the question was raised but not decided; and again in S. A. No. 451 of 1868 R, IV Mad. H. C, 234;

but the appeal was disposed of on another ground. If *Jimuta Vahana* is to be followed in districts not governed by the doctrines of the Bengal school, it must not be forgotten that to entitle the illegitimate son of a Soodra to succeed, his mother must have been a Soodra—if she belonged to another caste, he would only be entitled to maintenance. It follows that the illegitimate son of a *Soodra* is not an out-caste."

See accord. Inderun Valungapooly Taver v. *Ramasamy Pandia Taver and another* (this case confirmed in the Privy Council.) IV Madras Jurist page 328. There their Lordships of the Judicial Committee said, "On the whole, seeing that these parties are both of the Soodra caste, and that the utmost that has been alleged really is that the zemindar was of one part of the Soodra caste, and the lady to whom he was married was of another part, or of a subcaste, their Lordships hold the marriage to have been valid; to hold the contrary would in fact be introducing a new rule, and a rule which ought not to be countenanced."

Quœre, whether a woman may marry into a *lower* caste than her own? ib—See Per *Scotland* C. J. *supra*, and the Pundits' opinion in that case. In *Sri Gajaputty Hari Krishna Devi Garu* v. *Sri Gajaputty Radhika Patta Maha Devi Garu*, 2. Mad. H. Ct. R. p. 369, where the Civil Court had held that concubinage and a *Ghandarva* marriage were much the same thing, the Court said, "We are unable to adopt the view of the Civil Judge that concubinage and connexion by a Gàndharva marriage are much the same thing. If there had been such a marriage with Sunni, the mother of plaintiff, it would have been necessary to consider, if Gopinàdha was a Cshatriya, whether that marriage would not have been perfectly valid; being clear, however, that he was not Cshatriya, it is plain that this privilegium of the second class cannot attach. It is unnecessary therefore to say, and we do not say, whether such a marriage of a Ràjput would or would not have been valid." A Hindu may have a plurality of wives. The prohibitions against polygamy are directory and not imperative, like many other rules of Hindu law: per *Scotland* C. J: *Veerasami Chitty* v. *Appasami Chitty*, 1 Mad. H. Ct. R. p. 378.(a) The husband can claim his wife at puberty. *Hurka Shunkar* v. *Rajee Munohur*, I Borr. 353; ib. I Morl. Dig: p. 288. § 11. When a marriage cannot take place, in consequence of legal, or other impediments, it is laid down in *Strange's* Manual (§ 30, 31) that no special consequences follow, and that presents made to the girl are to be returned. But when the intended husband by his own conduct has prevented the marriage, he cannot sue for the return of his presents. *Divi Virasalingum* v. *Alaturti Ramaiya* Sp. A. 40 of 1860: Mad. S. R. for 1860, p. 274. There, the intended bridegroom had not attended for the purpose of being married. (b) By Hindu Law,

(a) Manu. Ch. III. 12. Ch. IX. 80 81 82. Yajnyawalcya, II. Dig. B. IV. Ch. I. S. II V. 68—72

(b) Nareda, II. Dig. B. IV. Ch. IV. V. 182.

marriage is a religious ceremony; a sacrament; and not in our sense of the term, a contract; an idiot or lunatic can therefore marry. *Dabychurn Mitter* v. *Radachurn Mitter;* No. LX. *East's* Notes of cases. 2. Morl. 99. (a) There is no objection to the marriage of a man mad or dumb from his birth. 1 W. and Bühl. p. 288. Q. 6.

Power of wife to bind husband. —The power of a wife to bind her husband by her contract, seems to rest pretty much on the same grounds as in the English Law. In *M. Veerasawmi Chetty* v. *Appasawmy Chetty.* 1. Mad. H. C. R. p. 377. where the wife had borrowed money, which it was assumed was for necessaries, *Scotland* C. J. said, "On this question the Hindu law appears to rest upon pretty much the same grounds as the English law. A person dealing with a wife and seeking to charge her husband, must shew either that the wife is living with her husband and managing the household affairs—in which case an implied agency to buy necessaries is presumed—or he must shew the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance —when of course the law would give her an implied authority to bind him for necessaries supplied to her during such separation, in the event of his not providing her with maintenance." A wife living apart from her husband, without cause, cannot pledge his credit, except under special circumstances. In the case above quoted, *Bittleston* J. said; "In cases of this kind, the burden of proof lies wholly on the plaintiff. He contracts with one and sues another. He must therefore show that the party with whom he contracted had power to bind the party whom he seeks to charge. By the law of England, in the case of husband and wife living together, the presumption is that the wife is the husband's agent for contracting debts for the necessities of the family. And according to Hindu law, also, a wife has authority to bind her husband by contracting for necessaries in proportion as the management of the family is confided to her. By Hindu law, perhaps, the presumption of authority is not so strong as it is by English law. But it is not necessary now to consider that point, *for here the husband and wife were living separate when the contract was made*; *and if husband and wife are living apart, special circumstances must be shewn to raise any implication of authority in her to bind him by her contracts.*" See also Mr. Stokes' note to the above case, which contains the authorities for holding the husband bound for debts contracted by his wife for domestic use, during his absence, or for the benefit of the family.(b) In certain castes she may bind her husband by her contracts made for the supply of articles to enable her to carry on her trade, such as weaving, or the like. It was so held in a case I argued in the late Sudder Court,

(a) Brahmapurana. II. Dig. B. V. Ch. III. V. 122.
Yajnyawalcya. II. Dig. B. V. Ch. III. V. 123.
Vyasa. II. Dig. B. V. Ch. III. V. 125.

(b) Nareda. I. Dig. B. I. Ch. V. V. 209
Yajnyawalcya I. Dig. B. I. Ch. V. V. 207.

though I cannot find the case reported, or a reference to it. (a) A wife cannot sue her husband for defamation, because "her husband is like her God;" and she must remain obedient to his order, and conform to his will. *Deokoanwur* v. *Umboram Lala.* 1 Borr. 370. Ib. 1. Morl. Dig. p. 288. §. 12. (b) Notwithstanding coverture, a woman can sue. Thus in the absence of her husband, she may sue to protect his rights. In *Papamal* v. *Ramasawmi Chetty*, 2 Mad. H. Ct. R. p. 365, the Court said, "This was a suit brought by plaintiff to procure the delivery to her of a share of land alleged to have been purchased with money subject to the provisions of a partition-deed executed by her husband and the undivided members of his family. It appears that the husband has been since 1854 absent in a foreign country. The Munsif considered the defence of first defendant, that there had been an assignment of the property to him, false, and decreed for plaintiff. The Civil Judge reversed this decree, because the husband had not been absent sufficiently long to raise a presumption of his death. It seems to us that the real question is not whether the inheritance has devolved upon the plaintiff by her husband's death, but whether in his absence, with the statute of limitations continuing to run against him, she is justified in suing for the protection of his present, and her prospective rights, as against his former co-parceners from whom he is now divided. That the wife represents for many purposes her absent husband, and in the most solemn transactions, there can be no question. In the *Ramnad Case*, we exemplified the representation from the highest authorities. If, therefore, we had been left to decide this case solely upon analogy, we should have considered that the wife sufficiently represented the absent and divided husband, to entitle her to sue for his share. There is, however, express authority upon which, as it seems to us, her right is unquestionable. In *Colebrooke's* Digest, p. 575, Sec. 450, Vishnu says "The king should guard the property of an infant and the effects of the husband and wife in the absence of the husband." This passage, explained by the context, shows that it is for the king to guard the property of the husband and wife in the absence of the husband, unless the husband has co-parceners, for in case of the existence of such co-parceners, Section 453 shows that it is their duty to keep the share of the absent co-parcener intact. If it is the duty of king to guard, it must be the duty of the Courts of Justice, which, in such matters, represent the king, to do so, and it seems to us that this is a clear authority for the present suit. The husband is absent, the persons against whom the property is to be protected are of course the divided co-parceners, and we are of opinion that it would be a positive denial of justice to refuse to the wife a right of action, the right of representing, the necessity for guarding which the law has

(a) Yajnyawalcya Vyvahara Mayuka Ch. V. S. IV. 20.

(b) Menu II. Dig. B. III. Ch. II. S. I. V. 103. Menu Ch. V. 154.

imposed upon the king." She may sue her husband. No. CXXIX. *G.* v. *K.* East's N. of Cases. 2. Mor. Dig. p. 234. She may sue jointly, with her husband, or without him. *B. C. Doss and anor.* v. *M. Paramauni and others.* 1. Hyde's. R. p. 281. It has been held that a Hindu husband cannot be convicted of robbing his wife 1. Morl. Dig. p. 129. §. 185. *Mr. Mayne* in his commentaries on the *Penal Code* doubts the propriety of this ruling. *Mr. Starling,* in his *Indian Criminal Law,* argues in favour of the decision, erroneously in my opinion; as Sec. 27 of the Penal Code speaks of property in possession of a wife *on account* of the husband, being in his possession. But *Stridhanum* is in possession of the wife, on her own account, and not for her husband.

Supersession——Divorce. A husband may supersede his wife. *M. Veerasawmy Chetty* v. *Appasawmy Chetty.* 1 M. H. Ct. p. 375. There *Scotland* C. J. said: "According to Hindú law and usage it seems clear that whatever may be thought of the morality of the step amongst Hindùs, polygamy is permitted and that it is competent to a Hindù to have several wives. How many wives, as Sir T. Strange observes in his *Hindú Law,* vol. 1, p. 56, it is competent for him to have at one and the same time, does not distinctly appear. The prohibition which is to be found directed against a plurality of wives save under certain justifying circumstances, such as the first wife's infidelity, bad temper, barrenness, or production only of daughters, appears to be treated, like so many other rules of Hindù law, as merely directory and not imperative." (*a*) According to the custom of the *Lewa Koombi* caste, a woman cannot, under any circumstances, obtain a divorce without her husband's assent. *Dyaram Doolubh* v. *Baee Nemba*: Bell. 36. Ib. 1. Mor. Dig. N. S. p. 181 § 1. In the South of the Madras Presidency a similar custom prevails among the *Maravers,* of whom are some of the principal Zemindars in Madura and Tinnevelly. So in *Dorasinga Taver* v. The *Ranee of Shivagunga and her son*; No. 2 of 1869, in the Madura Court, the 2nd Dft. was the son of the 1st, by her second husband. Marriage once solemnized by the ceremonies of *Wagdan* (betrothal) and *Saptapadi* (seven steps) can never be set aside, though irregularly contracted by the mother, without consent of the father. *Baee Rulyut* v. *Jeychund Kewal.* Bell. p. 43. (*b*) There is no such thing as Divorce (*eo nomine*) in the Hindú Law. The passage in *Strange's* Manual §33 is not strictly correct, that infidelity "*puts an end to the marriage.*" The passage relied on from the *Smriti Chandrica,* does not support his statement, in my opinion. Divorce enables the husband to marry again, although not the wife. It seems questionable, whether, notwithstanding her infidelity, consequent *status* of an irrevocable *outcaste,* forfeiture of inheritance, and severance from

(*a*) Narada. II. Dig. B. IV. Ch. I. V. 68. Baudayana. II. Dig. B. IV. Ch. I. V. 66. Menu. II. Dig. B. IV. Ch. I. V. 67 and 70. Yajnyawalcya. II. B. IV. Ch. I. 66.

(*b*) Menu. II. Dig. B. IV. Ch. IV. S. III. 169. Yajnyawalcya. II. Dig. B. IV. Ch. IV. S. III. 175.

her husband, she is not still entitled to *some* maintenance; 1 Str. H. L. 232 ib. 2. App. 344. 382. And cases *infra*. The law, it is true, looks upon her as *civiliter mortua*, and requires funeral ceremonies to be performed for her: but she could not again marry a Hindú. She is free to marry one not a Hindú. In *Rahmed Beebee* v. *Rokeya Beebee*, decided by Sir *A. Bittleston*, 29th October 1859 (not reported) a Hindú married woman, deserted her husband, became a convert to Mahomedanism, and married a Mahomedan, her Hindú husband being still alive. There the Judge said: "It was said that in this case there could be no valid marriage between the Plaintiff and *Gayasoodeen*, because *Rahmed* was formerly a Hindoo, and whilst she was a Hindoo was married to one *Govindoo*, who is still alive. I have looked with some care into the authorities cited, and procured a translation and commentary of the *Smriti Chandrica* cited by Mr. Strange. So far however as Hindoo law is concerned, it seems to me enough to say that in my opinion, a Hindoo married woman who deserts her husband, becomes a convert to Mahomedanism, and adopts the habits of and lives as the wife of a Mussulman, is altogether out of the pale of Hindoo Law—that she ceases to have any recognised legal *status* according to that law, which counts her as one dead, or at least recognises her existence only as an object of charity. This is not inconsistent with such passages as that cited from *Menu*; (*a*) "That neither by sale nor desertion can a wife be released from her husband;" which certainly have reference to persons still within the pale of Hindoo Law. "It seems to me, however, at variance with the spirit of Hindoo Law, to hold that it concerns itself with a woman in such case, as far as to impose on her any obligation not to marry again, *provided the second husband be not a Hindoo*, and if she does marry again the validity of that marriage must I think depend upon the law of the sect to which she has become a convert."

Divorce for adultery does not entail forfeiture of the wife's peculiar property. 2. Macn. Pr. p. 126. case 7. When a husband divorces his wife, he can claim damages from the adulterer. It was held by *Ryan C. J. Grant*, and *Seton, J. J.* in 1859 in the Calcutta Supreme Court, that an action of *Crim-con* would lie in that Court. *Soodasun Sain* v. *Lockenauth Mullick*, Morton. p. 107. S. C. Montriou's Cases p. 619. and see, *Coonju Mudduck* v. *Ramkissore Podar. Morton.* p. 80. No pecuniary damages, it was said, are recoverable by the husband against an adulterer, though he is criminally punishable for the act. Case from Zillah Ct. of *Madura*. 2 Str. S. L. p. 33. See case from Zillah Court of *Vizagapatam*. 2 St. H. L. p. 24; and case from Zillah Court of *Verdachellum*. 2 Str. H. L. p. 35. (*b*) In *Hurka Shunkur* v. *Raujee Munohee and others* 1. Borr. 353. Ib. 1. Morl. Dig. p. 288. § 11. damages and costs of suit were given to the Plaintiff, who sought to recover his wife from the De-

(*a*) Menu. Ch. IX. 46.

(*b*) Menu. Ch. VIII. 372 to 385

fendant, who had enticed her away. See also *Ram Tahul* v *Madho and others.* ib. p. 111. and *Chotun Bebee* v. *Ameen Chund* 6 Sutherl. c. r. p. 105. where it was held that a suit for restitution of conjugal rights will lie to compel a Hindú wife to return to her husband and live with him. Sections 4 and 5 of XXI of 1866, called the Native Converts' Marriage Dissolution Act, permit Converts to institute suits for the restoration of conjugal rights. In *Moonshee Buzloon Raheem* v. *Shumsoonissa Begum,* decided by the Privy Council on the 4th July 1867 (8. Sutherl. P. C. 13,) their Lordships observed, "Upon authority then as well as principle, their Lordships have no doubt that a Mussulman husband may institute a suit for a declaration of his right to the possession of his wife and for a sentence that she return to cohabitation and that that suit must be determined according to the principles of the Mahomedan Law." *Quære,* whether the order of the Court, directing the wife to return to cohabitation could, in the event of disobedience, be enforced under Section 200 of the Civil Procedure Code, by imprisonment, attachment of property, or both. See *Hur Sookha* v. *Poorun* 2. H. Ct. R. N. W. P., p. 115. In 6. Suther. c. r. p. 105, it was held that a suit will not lie to recover the person of a wife; but will for a declaratory Decree, to be enforced by imprisonment or attachment of wife's property; which was followed in *Koober Khansama* v. *Tun Khansama.* 8. Sutherl. c. r. p. 467 s. c. 5. Wyman. p. 12. See also *Totun Bee* v. *Ameer Chand.* 2. Wyman. p. 104. *Mt. Toofah and others* v. *Tussonda.* N. W. P. R. p. 337. But see *contra, Tahul* v. *Madho and others* 2. N. W. P. R. p. 111. But a suit will not lie by a Hindú converted to christianity, for the restitution of conjugal rights, or the person of his wife, she remaining a Hindú. *Musst Meejhoo and others* v. *Mukhoond Sahoo.* 1. Sutherl. c. r. p. 309. In *Moonshee Bugloor Ruheem* v. *Shumshoonissa Beegum.* 3. Madras Jur. p. 18. the Privy Council laid down the rule for dealing with cases of this kind. "In suits regarding marriage and caste, the Mahommedan law with respect to Mahommedans, and the Hindoo law with regard to Hindoos, should be considered as the general rules by which the Courts in this country should be guided. In a suit by a Mahommedan against his wife, who had left him, for restitution of conjugal rights, held, that the appellate Court in India should have applied, not the rule of equity and good conscience, but the principles of Mahommedan law baring on such cases." s. c. 5. Sutherl. P. C. p. 235. But in *In re the wife* of *P. Streenevassa* a converted Brahmin, Sir *W. Burton* ordered his wife to be restored to him upon *Habeas Corpus.*

Re-marriage :—A custom of the *Talapadi Koli* caste that a woman may leave her husband and re-marry another, without her husband's consent, even if proved, is bad, as entirely opposed to the spirit of the Hindu Law. The woman is punishable under sec. 119 of the Penal Code, and the man she re-married is guilty of adultery. *Reg.* v. *Kassan Goja. Reg.* v. *Bai Rupa.* 2. Bomb. H. Ct. Rep. p. 124. These re-marri-

ages seem common in Bombay. See the several Futwahs collected by *Bühler* and *West.* Vol. 1. p. 90.—3; on "*Lagna*" "*Pât*" and "*Natras.*" These second marriages are legalized by Act XV of 1856. See 1. Bühler p. 119. Among the Sikhs, it appears, that there is no difference, in point of legal effect, between a second or nikah, and first marriage. *Doe. D. Kissen Chunder Shaw* v. *Baidam Beebee.* Sir H. East's N. of C. (Case 14) 2. Morl. Dig. p. 22. But in *Karasoo Numbiar* v. *Government.* *Mayne's* Penal Code (5th Ed.) p. 317, where a custom was set up in Southern India, that a woman might divorce her husband for cause shown, such as impotence, drunkenness, or misconduct, and then marry again, the Court confined itself to saying that the custom had not been made out. As to re-marriage by a *Mahomedan* with a *Hindu* widow who becomes a *Mahomedan before* such marriage; See *Gopaul Singh* v. *Durgazee.* 3 Sutherl. c. r. p. 206. There, it was held that the Hindoo Law, disentitling a widow to inherit on re-marriage and marriage with a Mahomedan, does not apply to a widow who becomes a Mahomedan *before* marriage, with a Mahomedan. According to the principle laid down by Act XXI of 1858 Sec. 3 and Sec. 9 Reg. VII of 1857, conversion does not involve forfeiture of inheritance. A Hindú male cannot be guilty of bigamy; for the prohibition against polygamy is directory, not mandatory. Per *Scotland. C. J. Veerasamy Chetty* v. *Appasawmy*; 1 Mad. H. Ct. R. p. 378. *Supra.* But a Hindú female might be guilty of bigamy by re-marriage; for she cannot have more than one husband. Neither by "sale nor desertion" can a woman be released from her husband. In a recent case, where a Hindú became a Roman Catholic, and married according to Christian forms, after which he relapsed to Hinduism, and married a Hindú according to Hindú forms, his former wife being alive, it was held that he could not be convicted of bigamy. Mad. H. Ct. Rulings. 8 Nov. 1868. 3 Mad. H. Ct. R. Rulings p. vii. There *Holloway J.* said. "The Session Judge of Guntoor has, on a charge of bigamy, treated him as being still a Roman Catholic Christian who has contracted a second marriage in such circumstances as would render the second marriage void during the existence of the former.

"It seems impossible to assume that a man is not equally free to go from Hinduism to Christianity, and, if he pleases, back from Christianity to Hinduism.

"If then he is a Hindú, although there is the greatest doubt whether the primitive Hindú law authorized polygamy, it is impossible after the numerous decisions upon the subject to say that a second marriage of a Hindú is void in consequence of a previous valid Hindú marriage. It is manifest, therefore, that the 2nd Hindú marriage cannot be rendered void in consequence of a previous marriage which the Hindú law would not have recognised, it not having been performed with any reference to its provisions. The ceremony could not make it a Hindu marriage, because that was not a Hindú ceremony, and the consensual contract could not make it a Hindu marriage, be-

cause the consent was not to such a union but a very different one.

"If again, as it seems to me impossible to do, the man is to be treated as still a Christian, the union entered into with the Hindú woman would not in the view of any law governing Christian unions be considered a marriage at all.

"In either point of view it seems impossible, on the facts found, to say that the prisoner has, within the meaning of the section, contracted a marriage which is void in consequence of the previous marriage. There is no evidence that it is void.

"I am of opinion, therefore, that the conviction is bad in law and should be quashed."

Innes, J.—"Now that we have before us the record in this case, it seems to me that the conviction must be quashed, unless it should appear clearly from the evidence that the second marriage was void by reason of its taking place during the life of the first wife. And there seems to be nothing in the evidence to establish the invalidity of the second marriage. The statute 9 Geo. IV c. 74, Section 70, has only application to persons in India *professing the Christian Religion* at the time of the second marriage, which the prisoner did not, and the operation of it therefore need not be considered.

"If, in becoming a Christian, a man took upon himself the obligation of monogamy, *i. e.*, if the Christian Religion restricted him, on his embracing it, to one wife, then I should say that if such person married while still a Christian, he could not afterwards throw off his obligations by a mere change of profession. But I do not think that a profession of Christianity *ipso facto* imposes any such obligation, although doubtless the tendency of Christianity is adverse to polygamy. Polygamy as an *offence* exists only by statute; and there is no statute applicable to this country which makes polygamy an offence, with exception of the statute above referred to, and that, as before noticed, seems to apply to a second marriage, not by an apostate from Christianity to Hinduism, but by one still professing the Christian religion at the time of his second marriage. There was by statute, therefore, so far as I can see, no obligation imposed on the apostate to Hinduism to observe monogamy, and therefore nothing in the statute law which rendered void the second marriage by reason of the first wife being alive.

"Then it does not appear to me that the Hindu Law could regard the second marriage as void by reason of the wife of the first marriage being still alive, since the Hindu Law in re-admitting the prisoner to caste would altogether ignore the status which he had just abandoned, together with all obligations contracted under it, and would not recognise any thing as a marriage which was not entered upon by him as a Hindu, and with Hindu forms and ceremonies."

Re-marriage is now legalized by Act XV of 1856. Where a widow, who had, on re-marriage, forfeited her right to her husband's estate by Sec. 2, was allowed to retain possession by the next reversioner, it was held that this could not bind the heirs

of such reversioner, who, upon his death, were entitled to sue for the property and dispossess the widow. Where a Hindu died leaving widow, minor son, and daughter: the widow re-married after her husband's estate had vested in her son. The son subsequently died; and the estate was taken possession of by his step-brother. The widow sued him for possession: it was held that the suit was maintainable, and that she could succeed as heir to her son, notwithstanding her second marriage. *Akora Suth* v. *Boreani* 2. Beng. L. R. App. Pro. Civ. p. 199.

SENGAMALATHAMMAL v. VALAYUDA MUDALI.

SPECIAL APPEAL No. 505 OF 1866.

3. MADRAS HIGH COURT REPORTS. P. 312.

According to Hindú Law property acquired by a woman by inheritance is not to be classed as stridhanum.

This was a special appeal against the decree of F. M. Kindersley, the Principal Sadar Amin of Combaconum, in Regular Appeal No. 507 of 1865, reversing the decree of the Court of the District Munsif of Mannargudy in Original Suit No. 15 of 1863.

Srinivasa Chariyar, for the special appellant, the 4th defendant.

G. E. Branson, for the special respondent, the plaintiff.

The facts of the case and the authorities cited by counsel on either side sufficiently appear in the following

JUDGMENT:—The plaintiff claims the land mentioned in the plaint as purchaser from the 1st defendant, in July 1862.

The 1st defendant admits the sale and alleges that the land in dispute devolved upon him from his wife Comlattammal, to whom it belonged. Both the plaintiff and 1st defendant alleged that Comalattammal and her sister, the 4th defendant, upon the death of their mother divided the property of the deceased; and that the land in dispute fell to the share of Comalattammal.

The 2nd defendant alleges that the land in dispute belonged to Kanagatammah, who died 5 years ago, and descended to her daughter Sengamalathammal, under whom he (2nd defendant) rents the land.

The 3rd defendant disclaims all interest in the matter; and the 4th defendant, Sengamalathammal, concurs in the statement made by the 2nd defendant; alleging also that her sister Comalattammal died in the life-time of their mother.

The District Munsif disbelieved the alleged division between the two sisters and held that, as they were undivided, the surviving sister, Sengamalathammal, succeeded to the whole property left by the mother, whether the other sister Comalattammal pre-deceased her mother or not. Accordingly, he dismissed the plaintiff's suit. Upon appeal, the Principal Sadr Amin reversed this decree. He was of opinion that if Comalattammal succeeded to the mother's estate jointly with her sister, her share would, on her death, devolve on her husband in preference to her sister; and he therefore directed two issues to the lower Court. 1st. Did Comalattammal or her mother first die? 2nd. Whether plaintiff is entitled to recover the land and mesne profits claimed?

These issues were found in favour of the plaintiff; and the Principal Sadr Amin gave judgment accordingly.

Upon special appeal the argument was that, upon the facts found, the 1st defendant was not entitled as heir to his wife, and consequently could convey no title to the plaintiff; and the question is, whether upon the death of one of two daughters who succeeded jointly to the stridhanum of their mother (for it must be taken that this was the mother's stridhanum), the husband of the deceased is entitled to her share in preference to the surviving sister, no division having taken place between the sisters.

The right of the husband to succeed to his deceased wife's property depends amongst other things upon the nature of the title which his wife had in the property, viz, whether it was her stridhanum—whether it came under the class of woman's peculiar property.

In the present case, the property came to the deceased wife by inheritance from her mother; and though according to the Mitakshara property acquired by inheritance is classed as stridhanum—this is contrary to all the authorities in the other schools of Hindú Law, and is not supported by the Smriti Chandrika. It has also been questioned in the judgment of this Court in Special Appeal 81 of 1865, (II. M. H. C. Reps. 402) in which, following the Bengal Authorities, the Court held that property inherited by a mother from her son was not stridhanum; and that she took in it only a life-interest without power of alienation. On this point we find in Krishnasawmy Iyer's translation (Chapter XI. Section III. para. VIII) of the Smriti Chandrika, this passage "whatever the mother takes, she takes for herself *like* the stridhana called adhyagni and the like, and not for the benefit of both herself and her husband."

The Adhyagni is that which is given to a woman at the time of her marriage near the nuptial fire, and descends according to the author of the Smriti Chandrika, to daughters, the unmarried and unprovided having the preference, and, on failure of daughters, to their issue, the female issue however taking before the male.

This instance suggests the explanation that though in the Mitakshara property acquired by inheritance is in general terms classed with the other descriptions of woman's separate property, no more is meant than that *some* property acquired by women by inheritance will follow the rule of descent applicable to stridhanum, though not falling strictly under any of the descriptions of such property. But in the passage above cited, the author of the Smriti Chandrika is dealing only with the question whether in default of the daughter's son parents inherit jointly or separately, in what order, and it is in reply to an opinion of Camboo that "no order need be stated, for whatever is taken by either of the two parents out of the common property is for the benefit of both," that he likens what the mother takes to the Stridhana called Adhyagni. He concludes that the father takes before the mother, another point in which this special authority of Southern India is found at variance with the Mitakshara, but in agreement with the Bengal School.

In the case already mentioned at II. M. H. C. Reps. 405, the Court suggest that probably property inherited from a mother would be rightly classed as stridhanum, and certainly if the stridhanum of the mother descending to the daughter loses by that descent its character of stridhanum, it is difficult to suppose any other case in which property acquired by inheritance could be held to be stridhanum. Nevertheless even in this case the Bengal Authorities are clearly against it. Mr. McNaghten in his principles of Hindú Law (page 38 of the Madras Edition of 1865) says expressly, that Stridhanum which has once devolved according to the Law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such and is ever afterwards governed by the ordinray rules of inheritance : for instance, property given to a woman on her marriage is stridhanum and passes to her daughter at her death; but at the daughter's death, it passes to the heir of the daughter like other property, and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue," and (Prankishen Sing *versus* Moht Bhagurattee (1 Morl. Dig. 335) is a descision in support of his position, and so in the Dàya-

kràma Sangraha, Chap. 2, Sec. 3, para 6, where the author in treating of the succession to the separate property of a woman received by her at her nuptials, says "On the death of a maiden daughter or of one affianced in whom the succession had vested, and who having been subsequently married is ascertained to have been barren, or on the death of a widow who has not given birth to a son, the succession to the property which has passed from the mother to her daughter would devolve next on the sisters having and likely to have male issue, and in their default on the barren and widowed daughters; not on the husband of such daughter abovementioned in whom the succession had vested: for the right of the husband is relative to the woman's separate property and *wealth which has in this way passed from one to another can no longer be considered as the woman's separate property.* (See also Chap. 1, Sec. 3, para. 3, Chap. 2, Sec. 2, para 12, and the Dáya Bhága Chap. XI. Sec. 2, para. 30.) Upon the authorities the question stands thus:—

In the Mitákshara, Chap. II. Sec. 11., the commentator Vijnaneçvara, first quotes the text of Yájnavalkya, "what was given to a woman by the father, the mother, the husband or a brother or received by her at the nuptial fire or presented to her on her husband's marriage to another wife as also any other (separate acquisition) is denominated a woman's property;" and then in his commentary enlarges the text, by substituting for the words "any other [separate acquisition]" which in the original text would properly be construed to mean "any other *of the same kind,*" these words "and also property which she may have acquired by inheritance, purchase, partition, seizure or finding" which words are evidently taken from the text of Gautama quoted in para. 8 of Chapter 1, Sec. 1 of the Mitakshara descriptive of the different methods of obtaining ownership. "An owner is by inheritance, purchase, partition, seizure, or finding". It is, so far as we have been able to ascertain, this commentary, upon which the notion has been founded that property acquired by a woman by inheritance classes as stridhanum in Southern India. See Sir T. Strange's Hindu Law, Vol. 1 (Edn. 1830) page 31.

It is, however, quite certain that all property which a woman derives by inheritance cannot be so classed if it be meant thereby that the peculiar course of succession applicable to woman's special property is to be applied to it; for in Southern India, as elsewhere, the property which a widow inherits from her husband cannot so descend; nor,

according to the case in this Court already mentioned, property inherited by a mother from her son. We may mention, in passing, that the passage of Sir T. Strange's work, which is supposed in the judgment in that case to have been accidentally omitted from Mr. Mayne's edition, was in fact omitted by the author himself in the edition of 1830; a circumstance which strengthens the inference that he had seen reason to alter the opinion expressed in the edition of 1825, that property so inherited by the mother became her stridhanum. Finding then how narrow is the basis of authority upon which the proposition rests; and how clear and concurrent are all the other authorities, including even the Smriti Chandrika against it, we have arrived at the conclusion that, according to Hindú Law, property acquired by inheritance is not to be classed as stridhanum in Southern India, any more than in any other parts of the country. It is unnecessary to consider whether, as regards succession to a maternal estate except in cases otherwise expressly provided for, preference is to be given to daughters over sons, upon the principle referred to by Mr. Ellis (2 Vol. Sir T. Strange, page 405) that sons "shall succeed to the father and daughters to the mother," and with reference to such texts as that of Narada "Let daughters divide their mother's wealth; or on failure of daughters their male issue;" or that of Yájnavalkya "the daughters share the residue of their mother's property after payment of her debts."

In the present case, the only question is as to the right of the husband of a deceased daughter in preference to her surviving sister; and it seems clear that the husband can only be heir to his wife if the property be strictly her peculiar property.

But, independently of this question, it appears to us that, even if the property be assumed to have descended as stridhana jointly to the two sisters, the survivor of the two would take the share of the deceased in preference to her husband.

We do not think that the question of division or non-division between the sisters was material, for though sisters or co-widows may divide, the division will not alter the course of succession as Sir F. McNaghten (page 55) says "Among sisters or co-widows a division cannot be productive of more than convenience to the partitioning parties themselves; it will not give any one of them a right to dispose of her separate share or in any manner vary the rules of inheritance;" and as we held in a recent case where two widows having divided their joint estate,

the next heirs of the deceased husband claimed to succeed to the share of the deceased widow in preference to the survivor.(*a*)

But whether the sisters were divided or not divided, it seems to us that so long as there was a daughter living, she was entitled to the mother's estate in preference to any other claimant; for it is only on failure of daughters that any other claimant can come in. The general rule of Hindú Law is that amongst co-heirs survivorship takes place; and Sir F. Mcnaghten (R. 34) puts the case of 3 sisters succeeding jointly to their father's estate, and all dying childless or having daughters only; and he says that upon the death of one, the two others would succeed to her share in equal proportions and upon the death of one of these, the whole estate would vest in the survivor for her life. (See also I Borrodaile's Reps. 91.) The exceptions mentioned by Mr. Strange in Section 237 of his Manual, viz., that the male issue of a man, *i.e.*, his sons, son's sons, and son's grandsons, must have been exhausted before his lapsed share falls to those in parallel grade to himself, and that daughter's sons must have been exhausted before the lapsed share of the daughter falls to other daughters," are to be explained on the ground that "as the word 'son' intends male issue down to the great grandson since he is equally a giver of funeral oblations, so does the term 'daughter' comprehend the daughter's son, for he also is the giver of a funeral offering," as is expressed in the Dáya Bhága, Chap: XI. Sec. 2, para. 27. No. such explanation is applicable to the case which we have to consider; and we do not see any ground for not applying the general rule.

It seems to us, therefore, that the plaintiff derived no title from the 1st defendant, and that the judgment of the Principal Sadr Amin must be reversed and that of the District Munsif confirmed. The plaintiff must pay the costs in both the Lower Courts—but in this Court we think that each party should bear his own costs.

Appeal allowed.

The description in the *Mitacshara*, II. XI. Sec. 1—3 of the various kinds of property which class as *Stridhanum*, has been much canvassed of late, and limited by recent decisions, with respect to *inherited* property.(*b*) In *P. Bachiraju* v. *Venkatappadu*; 2 Mad. H. Ct. R. p. 402, it was held that property which a mother in-

(*a*) S. A. No. 404 of 1866, III. M. H. C. Reps. 268.
(*b*) Madhavya 41.

herits from her son is not *Stridanum;* and in the Leading Case, as we have seen, it was broadly laid down that *no* property *inherited* by a woman is *Stridanum.* Mr. Grady, in his his work on Hindu Inheritance, dissents from this decision, on which he comments adversely in p. 181. Mr. Bühler also, in W and B, 2nd Volume, has devoted a special note to the task of confuting the decision arrived at by the Madras High Court. Mr. Bühler relies chiefly on the meaning of the Sanskrit, and the force of certain particles. But the Madras ruling will probably be upheld, should the point, ever come under review by the Privy Council. There is very much to be urged against it, and it certainly proceeded on a consideration of Bengal. authorities; but the true solution of the question may probably be found, as suggested in *M. Thakoor Deebee* v. *Rai Baluk Ram and others,* 11. Moore's I. A. p. 139, to be, that while all property coming to a woman is, according to the *Mitacshara, Stridanum,* certain classes only of it are her *peculium,* and that it is this last class only that devolves according to the succession to woman's property. There the Court said, "A more plausible argument in favour of the Appellant's contention may be derived from the eleventh section of the 2nd chapter of the *Mitacshara,* if the words "also property which she may have acquired by inheritance," which occur in the 2nd article of this section, are taken (as they are taken by Sir *Thomas Strange* and others), include property inherited from a husband. For it may be said that there can be no distinction between different portions of a woman's *Stridhun,* or separate property: if she can dispose of part of it she may dispose of the whole; and further, that the whole must pass on her death, according to the law which regulates the snccession to *Stridhun.* Sis *William Macnaghten,* however, in his "Principles and Precedents of Hindu Law," vol. i. p. 38, lays down broadly that there is such a distinction. He says: "In the *Mitacshara,* whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium.*" And he then proceeds to show what is that *peculiam* or *Stridhun* proper, according to *Menu.*"

Mr. Bühler expresses a hope that at any rate the Madras ruling will not be extended to Bombay, where an opposite decision has been arrived at. Nor is it necessary; for while immoveable property inherited by a woman from her husband is there held to be her's for life only, as indeed is the law in all the Presidencies; according to the *Mayuka,* property inherited by a woman from her own family classes as *Stridanum,* and descends as woman's property.(a) So in *Navalram Atmuran* v. *Nandkishore Sivnarayen and another.* 1. Bomb. H. Ct. R. p. 208, it was expressly held that an inheritance descending on a woman from her own father classes as *Stridhanum.* In *Goburdhun Nath* v. *Onoop Roy and others.* 3. Suth: p. 105. c. r. it was decided that

(a) Vyvahara Mayuka, Ch. IV. S. X. 2. Mit. Ch. II. S. XI. 2.

the term "inherited" in the *Mitacshara*, in regard to a woman's *Stridanum* does not include *immoveable* property, so as to make it her *peculium*. In *Punchanund Ojbah and others* v. *Lanshan Misser and others*. 3. Sath. p. 140. c. r. it was held that according to the *Mitacshara* and *Vivada Chintamani*, all property which a woman inherits does not become her *Stridanum*; and that immoveable property devolving on a mother from her son, descends, not to her heirs, but his. See Acc; *Nufur Mitter and Rajah Mitter* v. *Ramkoomer Chutroojya*. 4. Beng. S. D. R. p. 310. 2. Macn. p. 209.

Personal property given to a woman at the time of her marriage becomes her's exclusively. 2. Macn. Pr. p. 122. Ib. 35. Sec. 2. Str. p. 47. Case 3. See Acc. *Prankishen Singh* v. *Mussumaut Bhagwuthe*, 1. Beng. S. D. R. p. 3. Such property is her *Soudayaca Stridhanum*. *Gosain Chund* v. *M. Kishenmunnee and another*. 6. Beng. S. D. A. Rep. p. 77. All property given by husband to wife for affection is *Stridhanum*. 1 W and Bühl. p. 3.(a) A *gift* of money by a son to his mother for her maintenance is her *Stridanum*. *M. Doorga Konwar* v. *M. Teejee Konwar* 5. Sutherl: c. r. p. 53. Property given by a husband to a wife, in which she would otherwise only have had a life estate, becomes her *peculium*. *Baboo Shed Manooj Singh* v. *Baboo Ram Perkas Singh*. 5. Beng. S. D. R. 148. See *K.* v. *G.* Sir H. East's notes. 2 Morl. Dig. p. 234. But in *Baboo Gunput Vingh* v. *Gurya Pershad*. 2. N. W. Pr. R. p. 230, it was held that a widow cannot dispose of immoveable property given to her by her husband, which has become a portion of her *Stridhanum*, the absolute dominion of a woman over her peculiar property not extending to land.(b)

But she cannot dispose of immoveable property, though given to her, 2. Macn. p. 35. On her death it passess to her heirs. Ib. Immoveable property given by a man to his grandson's wife is her *peculium*. She has absolute dominion over it. 2. Macn. p. 213. Landed property which a daughter obtains as a gift is her's absolutely. Ib. p. 214: *aliter*, as to what she takes by inheritance. *Ib.*(c) Personal property given by a man to his wife, on contracting a second marriage, is her's absolutely ib. 215. aliter as to realty. Ib. Where a father made a gift to a daughter, with remainder over, it was held that the *mesne profits* during the daughter's incumbency were her *Stridhanum*. *Guru Prasad Roy* v. *Nafar Das Roy and another*. 8 Beng. Law R. c. a. p. p. 121.

Ornaments freely given by a man to his wife are her own property, and descend to her heirs. *Gun Joshee Malkhoonder* v. *Sagoona Baee*. 2 Borr. 401: ib. 1

(a) Menu. Ch. IX. 194.
Yajnyawalcya. II. Dig. B. V. Ch. IX. S. I. V. 463.
Catyayana. Dig. B. V. Ch. IX. S. I. V. 464 465-475.
Vishnu. II. Dig. B. V. Ch. IX. S. I. V. 467.
Nareda. II. Dig. B. V. Ch. IX. S. V. 469.
Mit. Ch. II. S. XI. I. to 7.
Dayabhaga. Ch. IV. S. I. 21.
Smriti Chandrica. Ch. IX. S. I. 9 and 10, S. II. 7 and 12.
Madhavya. 42.
Vyavahara Mayuka. Ch. IV. S. X. 8. & 9.

(b) Nareda. II. Dig. B. V. Ch. IX. S. IV. 476.
Vyavahara Mayuka. Ch. IV. S. X. 9.
Dayabhaga Ch. IV. S. I. 23.
Smriti Chdndrica. Ch. IX. S. II. 11.

(c) Catyayana. II Dig. B. V. Ch. IX. S. I. V. 475.

Mor. Dig. p. 595 § 3.(a) Property given by a Hindú to her sisters, and paternal uncle's daughter, was held to be at their entire disposal as their *Soudayaca. Gosaien Chund Kobray* v. *Mt. Kishen munee.* 6 Beng. S. D. R. 77: ib. 1 Morl. Dig. P. 595. § 5. (b) A *gift* to a mother, by her son, for maintenance, is her *Stridhanum,* and cannot be recovered by the husband's heir, after the mother's death. *Mussumut Doorga Koomar* v. *Khunya Lall Awarti.* I. Wyman. p. 358. It is not correct, (see *Strange,* M. § 146.) to say that everything that a woman acquires during coverture passes to her husband. In *Ramasami Padeiyatchi* v. *Virasami Padeiyatchi* 3 Mad. H. C. R. 278, the Court said, "We regard that proposition as unfounded in Hindu law: and the contrary of it to be unquestionably true. It seems pretty clear that the passage of Mr. Justice *Strange's* Manual (Sec. 146), quoted by the Munsif as the ground of his original decision, cannot, without very numerous qualifications, be regarded as the law laid down by the *Smriti Chandrika.* It is rather the law propounded by an objector, from whom the author dissents." (c) The burthen of proving that certain property is *Stridhana* lies on those who claim under the widow. *Sreemutty C. M. Dossee Joykissen Sircar;* 1 Sutherl: p. 107. A husband in time of famine may dispose of his wife's ornaments given in dowry, even without her consent. *G. Yettaraizamah* v *G. R. Venkata Charloo:* Sp-A. 31 *of* 1853. Mad: S. R. for 1853. p. 254. The text from *Yajinavalcya,* there quoted by the Pundits, gives the husband the same power "for the performance of duty, or during illness, or while under restraint." It may be doubted whether the power would be countenanced to such an extent by our Courts. See *Hammuicka* v. *Rungapah.* 2 Str. H. L. p. 19. where it appears, that a creditor of the husband cannot seize the wife's *Stridhanum* in execution of his decree against the husband.(d) If a wife *consents* to the husband's disposal of her property to redeem family lands under mortgage, she is entitled, either before or after her husband's death, to recover the value of the property so disposed of, without interest; provided there be property available for that purpose. Ib. It is presumed, that by this is meant, that she has a lien or charge *upon her husband's estate,* to the extent of the value of her ornaments sold with her consent. (e) Property left as a legacy to a woman by her hus-

(a) Apastumba. II. Dig. B. V. Ch. IX. S. I. V. 472.
Devala. II. Dig. B. V. Ch. IX. S. I. V. 478.
Menu. Ch. IX. V. 200.
Vyavahara Mayuka. Ch. IV. S. X. 10.
Dayabhaga. Ch. IV. S. I. 15.
Dayacrama Sangraha. Ch. II. S. II. 16.
Smriti Chandrika. Ch. IX. S. II. 15 27.
Madhavya. 41.

(b) Vide.
(a) in the last page.

(c) Smriti Chandrika. Ch. IX. S. I. 12 to 16.

(d) Devala. II Dig. B. V. Ch. IX. S. I V. 478.
Yajnyawalcya. II. Dig. B. V. Ch. IX. S. I. V. 479.
Mit. Ch. II. S. S. XI. 31-32.
Vyavahara Mayuka. Ch. IV. S. X. 10.
Smriti Chandrika. Ch. IX. S. II. 17. 18-20.
Madhavya. 46.
Dayabhaga. Ch. IV. S. 1-24.
Dayacrama Sangraha. Ch. II. S. II. 38. 21.

(e) Catyayana. II. Dig. B. V. Ch. IX. S. I. V. 476.
Vyavahara Mayuka. Ch. IV. 3. S. X. 10. and II.
Smriti Chandrika, Ch. IV. S. II, 13.
Madhavya. 46.

band's or her own relations, is *Stridhanum*, and her husband has no right to it; but if it be given to her by a stranger, she cannot part with it, without her husband's consent. *Ramdalol Sircar* v. *S. M. Joymoney Dabey*. No. XLV. *East's* N. of C. 2 Mor. Dig. p. 56.(a) A wife or widow may alienate her *Stridhanum*, except perhaps *land given* to her by her husband. In *Do, dem. Kullamall* v. *Kuppu Pillai*. 1 Mad. H. Ct. R. p. 87. the Court said; "Now there is no doubt that according to Hindú law, land, as well as any other property, may be possessed by a woman as *Stridhana* (Mitakshara, cap. 1, sec. 2, placita 1-3); and after consulting all the authorities within our reach, we think the law must now be taken to be that with respect to her *Stridhana* (except, perhaps, land, the gift of her husband, as to which we at present say nothing, a widow is not subject to the restrictions against alienation which clearly apply to property that she succeeds to upon her husband's death. According to the Bengal school of law, it seems clear, that whether as wife or widow, a woman has an absolute power of alienation over her *Stridhana* with the exception of *immoveable* property bestowed upon her by her husband. See the *Daya-bhaga*, cap. 4, sec. 1, *placita* 21 -23. But, as is observed by *Mr. Sutherland* in his remarks at page 430 of the second volume of *Sir Thomas Strange's* work on Hindú law, "the *Mitakshara* is wholly silent on the subject of the power of women to alienate their peculiar property; though explicit in disavowing all authority in the husband to appropriate the same," and the language used by Sir Thomas Strange at page 247 of the first volume of the second edition of his work, as well as the remark of *Mr. Sutherland* at page 21 of the second volume of the same work, when looked at alone, tend to raise a doubt whether according to the Benares school of law, there is not a general restriction against alienation by a wife or a widow of *immoveable* property held by her under whatever title. When, however, we find it stated in the same work, and by numerous other authorities, in broad and general terms, that a woman's *Stridhana* is her absolute property and at her independent disposal, (with, perhaps, as before alluded to, the exception of land, the gift of her husband); and there being no ground, that we can see for any distinction in this respect between moveable and immoveable property held by a woman, we are of opinion that the Hindú law recognises the power of alienation to the extent we have just laid down. We may refer here to the following authorities; Sir Thomas *Strange's Hindu law*, 2d ed. 1st vol., pages 27, 28, 247, 248: Mr. *Colebrooke's* remarks in the second volume of the same work, pages 19, 402, and 407: *Macnaghten's Principles of Hindu Law* by *Wilson*, pages 43, 44,

Dayabhaga. Ch. IV. S. 1. 24.
Dayacrama. Sangraha. Ch. II. S. II. 35.
(a) Catyayana. II. Dig. B. V. Ch. IX. S. I. V. 475.
Menu. Ch. VIII. 416.
Vyavahara Mayuka. Ch. IV. S. X. 7.
Dayabhaga. Ch. IV. S. I. 20.
Smriti Chandrika. Ch. IX. S. I. 16.
Madhavaya. 42.
Dayacrama, Sangraha. Ch. II. S. II. 25.

and 136; and Colebrooke on Contracts, page 28." And see *acc. T. Chatterjee* v. *D. Banerjee.* 3 Sutherl: p. 49. In *Baboo Grinput Singh* v. *Gunga Pershaud* 2 H. Ct. R. N. W. P. p. 230. it was expressly decided that a woman cannot alienate *land* the gift of her husband. (*a*) She has more power over her *Soudayaca Stridhanum* : as to which see Mr. *Stokes'* note to I. Mad. H. Ct. R. p. 90. (*b*) The power of a widow to alienate her peculiar property was further considered in *D. Ryaparaz* v. *Mullupudy Rayadu and others* Sp. A. 6 of 1865. 2. Mad. H. Ct. R. p. 360. There, the gift by a married woman of her *Stridhanum* (immoveable property) to a kinsman, she living apart from her husband, was set aside. There the Court, commenting on the case in I Mad. H. Ct. R. p. 87, observed that the decision in that case really turned on the 15th section of the Limitation Act; and made the following qualifying remarks; " As to the absolute power of the woman to alienate her special property, *Kullammal* v. *Kuppu Pillai* was quoted. The only point absolutely decided in that case was, that a person ousted from property was entitled, under Section 15 of the Limitation Act, to be replaced in possession if he applied within six months. The case was absolutely decided upon this simple principle. With the view, however, of preventing further litigation, the Court laid down the following proposition, which is the result of the judgment:—A widow is not, as to her separate property, subject to the restrictions upon alienation, that clearly apply to property which she takes through her husband upon the death of that husband. Taking, therefore, either the point actually decided in that case or the question upon which the Court expressed its opinion, the present case is wholly different, and keeping in view the following passage from *Colebrooke* (Obl. Sec. 611) which was not quoted in the argument, "and she is subject to his control even in regard to her peculiar and separate property," a passage written by this greatest of all authorities, with all the texts from *Jimuta Vahana* and his own *Digest* before him, and looking also at the repeated texts of Hindu Law as to the absolute dependence as to every act of the woman, and at the fact, abundantly clear from the history of our own law, that so called absolute property is quite consistent with restricted power of alienation, and that this is still more conspicuously the case with the Hindú law, we could not, without the greatest consideration, conclude that a woman can, without the consent of her husband, during coverture, absolutely alienate even her own landed property." With regard to the altercation in the case before the Court, the Judges said; "Here, however, it is not necessary to decide this question, because it

(*a*) Nareda II. Dig. B. V. Ch. IX. S. I. 476.
Dayabhaga. Ch. IV. S. 1-23.
Vyavahara. Mayuka. Ch. IV S. X. 9.
Smriti Chandrika. Ch. IX. S. II. 12.
Madhavya. 42.
Mit. Ch. I. S. 1. 20.
Dayacrama Sangraha. Ch. II. S. II. 31-32.

(*b*) Catyayana. II. Dig. B. V. Ch. IX. S. I. V. 475-477.
Dhayabhaga. Ch. IV. S. I. 21-22.
Vyavahara Mayuka. Ch. IV S. X. 7 & 8.
Smriti Chandrika. Ch. IX. S. II. 7 and 12.
Madhavya. 42.
Dayacrama Sangraha. Ch. II. S. II. 26.

is quite clear that this taking of the woman's property by the plaintiff, her kinsman, is wholly repugnant to the Hindú law. The *Mitacshara* (Cap. 11, Sec. 11, articles 32 and 33) shows that for certain urgent needs the husband may take the woman's separate property, but that any other relative who takes it is to be punished for theft; and the *Dayabhaga* (Cap. IV. Sec. 1, articles 23 and 24), while as is usual with authors of that school asserting a more extensive power, still renders it obligatory upon her relative so taking her property even with her consent, to restore it when he becomes rich. It is quite clear, too, from the context that the taking must be only upon the ground of urgent and proved necessity. This, therefore, is a case in which without any allegation of necessity, if such necessity could in the life-time of the woman's husband avail the plaintiff, he seeks through the agency of the Courts to do that which the Hindú Law wholly forbids his doing—take to himself the property of his kinswoman. Loooking at the existent guardianship, whether self-imposed or not, we are not informed, it is quite clear, that it would be difficult to establish a contract against the woman, and equally difficult to conclude that there was such freedom of will as could alone render a contract valid. The transaction, so far as these pleadings disclose it, would be one of very doubtful efficacy. On these grounds, therefore, we dismiss this special apppeal with costs."(a)

The father of a woman is bound to restore her dower to her husband, if she pre-decease him without living issue; for in such a case the husband is heir to his wife. *Hurree Bhayee* v. *J. Keeshoodass* 1. *Borr.* 393 : Ib. M. Dig 290 §. 20. (b) A claim by a wife against her husband, from whom she had parted, for her dower-jewels, was allowed, as they are her *peculium*. *Wulubrham Oomayashunker* v. *Bijlee* 2 *Borr.* 440. Ib. 1 Morl. D. p. 290. § 25. (c) Where a Hindú sued his wife and father-in-law for production of dower-jewels not forthcoming since his marriage, they were ordered to be produced, the wife retaining them as her peculiar property. *M. Rajaram and another* v. *Govind Rutunjee* 2. Borr. 245. Ib : 1. Mor. Dig. p. 290. §. 22. (d) Where the son of a man

(a) Menu. Ch. IX. 199.
Catyayana. II. Dig. B. V. Ch. IX. S. I. V. 470 477.
Vyasa. II. Dig B. V. Ch. IX. S. I. V. 482.
Dayabhaga. Ch. IV. S. 20.
Vyavahara. Mayuka. Ch. IV. S. X. 7 and 8.
Smriti Chandrika. Ch. IX. S. II. 7. and 12
Madahavya. 42.
Dayacrama. Sangraha. Ch. II. S. II. 25. and 26.

(b) Yajnyawalcya II. Dig. B. V. Ch. II. S. II. V. 501.
Menu. II. Dig. B. V. Ch. IX. S. II. V. 503. and 508.
Nareda. II. Dig. B. V. Ch. IX. S. II. V. 504.
Dayabhaga. Ch. IV. S. III. 2.
Dayacrama Sangraha. Ch. II. S. III. 14.
Mit. Ch. II. S. XI. 10.
Vyavahara Mayuka. Ch. IV. S. X. 26.
Smriti Chandrika. Ch. IX. S. III. 27.
Madhavya. 44.

(c) Catyayana. II. Dig. B. V. Ch. IX. S. I. V. 481.
Devala. II. Dig. B. V. Ch. IX. S. V. 478.
Apastamba. II. Dig. B. V. Ch. IX. S. I. V. 472.
Smriti Chandrika. Ch. IX. S. II. 23.
Madhavaya. 46.

(d) Catyayana. II. Dig. B. V. Ch. IX. S. I. V. 477.
Nareda. II. Dig. B. V. Ch. IX. S. I. V. 476.

who had put away his wife, claimed to oblige her to give security for her dower, which he alleged was being wasted, the Court refused it, on the ground that *she was sole mistress* of her dower. *Manuckchund Premchund* v. *Mt. Premkoonwur* 2 Borr. 321. Ib. 1 Mor. Dig. p. 290. § 23. A woman does not lose her *Stridhanum* because she has been divorced 2. Macn. p. 126.

A woman's property devolves, according to the form of her marriage, on her husband or her parents. Her children's rights are never affected thereby. This question only arises on failure of progeny. See as to the effect of form of marriage under *Mitacshara* Law. 2. W. and Bühl. p. 95. As to the same under *Dayabagha* Law. See Dayabagha. Ch. IV. V. 3. note. Stokes H. Law Books. p. 260. 2. Str. 399. 1. W. and Bühl. 225. *M. Thakoor Deybee* v. *Rai Baluk Ram* 11. Moore. I. A. p. 139. See the *Ordo successionis* set out, 2. Str. 402. See also Grady, on Hindú Inheritance. Ch. VIII. S. 2. on *Stridhanum*, where the *Ordo successionis*, according to the several Schools, is set out in full; but as the information is gathered from text-writers, not decided cases, it is not farther noticed here. The differences, accordingly to different Schools and different Hindu authorities, are very intricate and complicated. The *Mitacshara*, *Vyavahara Mayuka*, and *Smriti Chandrica*, will all be found to differ in this respect from one another.

When *Stridhanum* has once devolved as such upon an heir, it does not continue to devolve as *Stridhanum*, but afterwards devolves according to the ordinary rules of Hindú Law. *Srinath Gungopadhya* v. *Sarbamangala Debi* 2. Ben. L. R. 144. Therefore, at the daughter's death, it passes to the general heirs. *Pronkishen Singh* v. *M. Bhagurattu*. 1. Beng. S. D. R. p. 8. See the principal case, *supra* and see 2. Macn. 123. 125. In *Manickchund* v. *Chotu Lal*. 2. Macn. Pr. p. 127. Case 9; where a husband sold houses which had descended on his wife from her father, the sale was set aside, because marriage does not vest the wife's peculiar property in the husband. *What is given* to a woman by her own father is her *peculium*, and she may dispose of *land* so given. 2. Macn. 239. See 2 Str. 15. 17.(a) Land may be given as *Stridhanum*.(b) Ib. *Stridhanum* may be given to a slave girl on her nuptials. 2. Str. p. 16. A husband cannot alienate his wife's *Stridhanum*, save for necessity. 2. Str. p. 18.(c) Property given by a mo-

Vyavahara Mayuka. Ch. IV. S. 10-9.
Dayabhaga. Ch. IV. S. I. 23.
Dayacrama Sangraha. Ch. II. S. II. 31.
Smriti Chandrika. Ch. IX. S. II. 3 and 4

(a) Dayabhaga Ch. IV. S. I. 1 to 4 and 21.
Mit. Ch. II. S. XI. 2.
Vyavahara Mayuka Ch. IV. S. X. 2 and 8.
Dáyacrama Sangraha Ch. II. S. II. 26.

(b) Catyayana II. Dig. B. V. Ch. IX. S. I. V. 475.
Dayabhaga Ch. IV. S. I. 21 and 23 S. III. 12.
Vyavahara Mayuka Ch. IV. S. X. 5.
Madhavya 42.
Smriti Chandrica Ch. IX. S. I. 10.
Dayacrama Sangraha Ch. II. S. II. 26.

(c) Catyayana II. Dig. B. V. Ch. IX. S. I. V. 475.
Yajnyawalcya II. Dig. B. V. Ch. IX. S. I. V. 479.
Dévala II. Dig. B. V. Ch. IX. S. I. V. 478.
Dayabhaga Ch. IV. S. I. 24.
Mit. Ch. II. S. XI. 32.
Vyavahara Mayuka Ch. IV. S. X. 10.
Madhavya 46
Smriti Chandrica Ch. IX. S. II 13 to 21.

ther to her daughter is her *Stridhanum*, and descends to her daughter, though she herself commit suicide. 2. Str. 333. *Samonodacas* are not heirs to *Stridhanum*, according to the *Mitacshara*. 1 Bühl. 239. In Bengal, the son of a maternal uncle is not a legal heir to a woman's peculiar property. *Sreenarrain Rai* v. *Bhya Tha*, 2. Beng. S. D. R. p. 23. A death-bed gift by a woman of her *peculium* to strangers is good, if there be no heirs 2. Macn. 217. Where a man directed his wife to settle certain property after his decease upon their daughter, and she did so by deed of gift in these terms, "to be enjoyed by her, her sons, "and grandsons &c., one after an- "other the other heirs not to have "any concern with it," it was held that the daughter's daughter had no right to share therein with her brothers, the daughter's sons. *Srináth Gungopadhya* v. *Surbamangala Debi*. 2. Ben. L. R. 144. But for the deed of gift the sister and brothers would have inherited jointly *Daya bhaga* C.IV : S. II. *Stridhanum* passes to the woman's daughter at her death. Ib. 2. Macn. 126.(a) It goes to her own heirs, to the exclusion of her husband's heirs, 2. Str. 262.(b) Unmarried daughters succeed before married daughters. 1. W. and Bühl. 200.(c) 1. The husband, on failure of progeny, is heir to his wife's *peculium*. 2 Str. 50. 1. W. and Bühl. 208. 209.(d) "Progeny" includes the daughter's daughter. 1. W. and Bühl. 201.(e) A Pât, or second husband, may be heir. 1. W. and Bühl. 209. A step-son. Ib. 217.(f) Mother-in-law. Ib. 219; and she takes before step mother-in-law. Ib. 220. Husband's brothers Ib. 222.(g) Their sons. Ib. 223.(h) Daughters-in-law Ib. 228. Sister's son Ib. 252. Sister's daughter Ib. 254. 255. A betrothed daughter is not entitled, at her mother's death, to share in her *Stridhanum*; but the unbetrothed daughters alone inherit with the sons. *Srinath Gangapadhya* v. *Surbamanyala Debi* 2, Ben. L. R. p. 144.(i) Where two married daughters claimed the property of their mother, it was held that the Mahratta School did not prefer the married daughter who had a son, to the daughter who had not a son; and that priority of claim depended on endowment; the unendowed daughter being entitled to the preference. *Bukulbu* v. *Munchabhai* 2 Bom. H. C. R. p. 5 Ap. Jur.(j) A daughter who becomes incurably blind in her infancy, has she a right to inheritance, or only to maintenance? Ib. Married daughters are not excluded from the succession, either by the *Dayabhaga* or *Mitacshara*. *Binade Koonaree Debee* v. *Purdour Gopal Sahee* 2 Sutherl. R. p. 177. c. r.(k)

(a) Mit. Ch. II. S. XI. 9 and 10.
Madhavya 43.
(b) Mit. Ch. II. S. XI. 8 and 9.
(c) Mit. Ch. II. S. XI. 13.
(d) Yajnyawalcya II. Dig. B. V. Ch. IX. S. II. 501.
Menu. do. V. 502.
Nareda. do. V. 503.
Dayabhaga Ch. IV. S. III. 3, 5, 6 and 10.
Mit. Ch. II. S. XI. 10 and 11.
Vyavahara Mayuka Ch. IV. S. X. 28 & 29.
Smriti Chandrica Ch. IX. S. III. 27-30 and 32.
(e) Mit. Ch. II. S. XI. 9 and 12.
(f) Dayabhaga Ch. IV. S. III. 34
Smriti Chandrica Ch. IX. S. III. 38.
Dayacrama Sangraha Ch. II. S III. 11.
(g) Dayabhaga Ch. IV. S. III. 37 and 39.
Mit. Ch. II. S XI. 11.
Dayacrama Sangraha Ch. II. S. VI. 3 & 4.
(h) do. do. do.
(i) Dayabhaga Ch. IV. S. II. 23.
(j) Mit. Ch. II. S. XI. 13.
Vyavahara Mayuka Ch. IV. S. X. 18.
(k) Mit. Ch. II. S. XI. 13.
Dayabhaga Ch. IV. S. II. 9 and 23.

BHOIRUB CHUNDER GHOSE V. NOBO CHUNDER GOOHO.

1. Wyman C. R. P. 168. S. C. 5. Sutherland. C. R. P. 111.

Bhoirub Chunder Ghose and another, *Appellants.*

versus

Nobo Chunder Gooho and others, *Respondents.*

A Hindoo widow's right to maintenance out of lands which belonged to her husband and have devolved on her son, is a purely personal right which cannot be sold in execution of a decree or otherwise transferred.

It is contended in this case that the right of maintenance which a Hindu widow has out of lands which belonged to her husband, and have devolved on her son, may be sold in execution of a decree against her.

We know of no authority to support this contention; and are of opinion that although the widow may be entitled to maintenance out of the lands in question, she has no "right, title, or interest" in the lands, which can be sold in execution of the decree against her. Her right to maintenance is a purely personal right, and cannot be transferred to another.

The appeal is dismissed with costs.

1st. *As to maintenance of wives and widows.* Maintenance is a charge upon the inheritance, as the Leading Case shows; but it is personal and not transferable. One of the chief incidents of marriage which come before the Courts, is the wife's right to maintenance, its amount, &c. Where husband and wife live together, he of course maintains her: where she leaves him *for just cause,* the husband must maintain her. After his death, she is entitled to maintenance from the family funds, she remaining chaste. (a) She can compel her husband's son to give her sufficient mainte-

(a) Menu. I. Dig. B. II. Ch. IV. V. 11.
Menu. Ch. IV. 251. Ch. IX. 74 and 95. Ch. III. 57-58 and 59.
Nareda. II. Dig. B. V. Ch. VIII. S. I. V. 405. I. Dig. B. I. Ch. V. V. 209.
Yajnyawalkya II. Dig. B. V. Ch. V. S. I. V. 334. II. Dig. B. IV. Ch. I. S. 2. V. 72 and 74.
Dayabhaga. Ch. II. 23. Ch. III. S. 1-7. Ch. IV. S. I. 25.
Smriti Chandrika. Ch. IV. 15-16 and 17. Ch. XI. S. I. 34. Ch. V. 48.
Madhavya. 30 and 40.
Mit. Ch. II. S. T. 18 and 20.
Vyvahara Mayuka. Ch. XX. 1. Ch. IV. S. VIII. 6. Ch. IV. S. XI. 12.

nance. *Sree M. Nundoo dasee Dabie* v. *Toynarrain Purkdassee.* F. Macn. 60. and see *Subchunder Bose* v. *Gooroopersaud Bose* Ib. 62. A. grand-mother succeeding to her grandson must maintain her daughter-in-law. *S. M. Teemoonee Dosee* v. *Attaram Ghose* ib. 64. The right attaches from the betrothal contract of marriage. It is. the duty of the husband's family to maintain her, even though he die before she attains her puberty. *Ramien* v. *Condumal* Sp. A. 64 of 1858. Mad. S. R. for 1858 p. 154. The Court put the following question to the Pundits: "Is the maintenance of a minor widow, during the time of her immaturity, and while still residing in her parents' house, to be provided for by her husband's family?" To which they replied: "The duty of maintaining a female legally rests with her husband from the moment of her marriage; but according to custom, she, while immature, resides with her parents, and they maintain her from affection. If they, from inability, *or other cause,* demand her maintenance from her husband's kinsmen who have succeeded to his property, they will, of course, be bound to maintain the widow in question:" whereupon the Court said, "Under the exposition of the law as given by the pundits, and which they are satisfied is correct, the Judges resolve to affirm the decrees below, and dismiss this appeal with costs. They observe that the support of the widow by the parents is, in such a case, *purely* voluntary: they may refuse to do so, not merely if unable, but for any other causes, among which "unwillingness" of course ranks." (*b*) The right is personal to the wife or widow, and cannot be transfered to a third party; it is not saleable. *B. Chunder Gous* v. *N. Chunder Godho.* I. Wyman. p. 168. S. C. 5 Sutherl: p. 111. It cannot be attached in execution of a decree, though a sum representing maintenance already accrued, May. *M. Deon Koer* v. *Sunghum Singh.* 3 Wyman. p. 207. (*a*) *Kasheehuree Debia v. Greesh Chunder Lahoree.* 6. Sutherl. c. r. p. 64. *Hujamulty Debia Chondrain v. Koroona Moyee Debia Chondrain.* 8 Sutherl. c. r. p. 41. Nor can it be attached in execution of a decree obtained against the deceased husband. *Koomaree Dabea* v. *Gresh Chunder Lahoory* Marsh. p. 200. Maintenance is a charge on the inheritance. 2. Str. 212. A husband cannot, by selling his land, defeat his wife's right, where there is no other property from which to maintain her. In *Lachchanna.* v. *Bapamana* Sp. A. 117 of 1860. Mad. S. R. for 1860; p. 230, the Sudder Court set aside a sale under such circumstances. See Acc: Special Appeal No. 13. of 1861. Bombay Reports. Nor can a husband defeat his wife's rights by will. *Sonatun By saik* v. *Sreemutty Juggutsoondree Dossee.* 8, M. I. A. p. 66. A widow's right being chargeable on the property forming her husband's estate, remains claimable out of the pro-

(*b*) Yajnyawalkya. II. Dig. B. V. Ch. V. S. I. V. 334.
Menu. II. Dig. B. IV, Ch. IV. S. III. V. 49
Mit. Ch. II. S. X. 12.
Smriti Chandrika. Ch. V. 42 and 43.
Madhavya. 40-35.
Vyvahara Mayuka. Ch. IV. S. XI. 12.
Dayabhaga. Ch. V. 19.
Dayacrama Sangraha. Ch. III. S. I. 17.

(*a*) Vyasa. Vyavahara Mayuka Ch. IX, 6.

perty, notwithstanding its alienation by the heirs, unless she bargains to forego it. *Heera Lall* v. *Mussumut Koasillah.* I. N. W. P. Rpts. p. 42. and see *Ramchuwer Taranu* v. *Mt. Tasooda Konmum.* 2. N. W. P. R. p. 134,(a) where it was held that "the heir who takes and becomes possessed of the estate of the deceased, must be held to continue to be primarily responsible both in person and property for the maintenance of the widow, even though he should have fraudulently transferred that estate or otherwise have improperly wasted it, and the widow is bound to look to the heir for her maintenance and to claim it from him primarily rather than from the estate transferred or wasted, which may nevertheless be in the last resort answerable to her claim." But when the estate sold so or alienated is not charged with the maintenance, the purchaser acquires it free from incumbrance. The widow can only look for her maintenance to the personal security of the members of the family. Thus, in *Renjomoonee Debia* v. *Rajcoomar Beebee.* 2. Waym c. r. p. 239. where the facts were as follows:

The plaintiff was a widow, a member of a joint Hindoo family, who, by an agreement between herself and the other members of the family, was to receive, in lieu of property to which she was entitled as heiress of her husband, certain monthly payments, it being declared that if the parties failed to pay her she might sue for arrears. A portion of the property in which she would have had an interest, but for this contract, was sold to a person named Guddadhur Banerjee in execution of a decree; the plaintiff subsequently brought a suit against Guddadhur, and obtained a decree against him for a proportion of her maintenance allowance, as if it were a charge on the property purchased by him. On appeal the Court said; "We are of opinion that it is perfectly, clear that under the original agreement, the maintenance contracted to be paid to plaintiff was not a charge upon the estate, and that in point of fact the purchaser acquired the share purchased by him free of any incumbrance in respect of it. "But the Lower Appellate Court was of opinion that the decree against Guddadhur bound his share of the estate, and that the now defendant was also bound by that decree.

"We do not think this argument well founded. As a matter of fact, as we have said already, the share acquired by the defendant was free from all incumbrances. The defendant, as purchaser at a sale by auction for arrears of revenue, did not come in as privy in estate to Guddadhur, the debtor, nor was he in any degree bound by the judgment which prevented Guddadhur from denying that the share was encumbered. He came in as a stranger by an act in law, and we think it clear that a person so coming in as a purchaser in execution of a decree of a Civil or Revenue Court, is not

(a) Vrihaspati. Vyavahara Mayuka Ch. IX. 4.
Vyasa. Mit. Ch. 1. S. I. 27.
Smriti Chandrika. Ch. XI. S. I. 34.
Madhavya. 35.
Dayabhaga. Ch. II. 23.

bound by any admission made by him, or by a decree against a prior owner. The decree did not directly affect or bind this land, but merely bound Guddadhur personally, and prevented him from denying his liability. It is not like the case of a judgment in a boundary suit against a prior owner; as to which, see 2 Weekly Reporter, page 191." When a proprietor of an estate died, leaving a widow and four sons, three of whom were subsequently implicated in a rebellion, for which the estate was confiscated by the State, the widow was held entitled to maintenance out of the whole of her husband's ancestral estate. *M. Golab Koonwur*, and *others* v. *Collector of Benares* and *another* 4. M. I. A. p. 246. The right to be maintained gives no right to any *share* in the property. Therefore in a case in. N. W. Pr. R. for 1860, p. 447, it was held that the widow of one of three undivided brothers had no such right to a *share* of a house, the joint property of the family, as to prevent an effective sale by the surviving brothers: and see 2. W. and Bühl. p. 31. Q. 4. Y. *Seetamah* v. *Kamatchumah and others*, Sp. A. 106 of 1855. Mad. S. R. for 1855. p. 198. *Coopumall* v. *Rookmany Ummall* Sp. A. 148 of 1855. Mad. S. R. for 1855. p. 238. Mr. *Ellis* (II St. El. 305) observes, "The law says, she shall have a maintenance; but it is not required that either the family stock, or her own shall be reduced to afford it. It is clearly meant that it shall be a maintenance by income: if therefore she have no property from which she can derive income without destroying the property she is entitled to a full share." In an undivided family, the widow of a joint member is entitled to maintenance only, according to the *Mitacshara*: see *In re Hurabuthe*. 4 Sevestre p. 573. The withdrawal of their rights by the other co-sharers of the ancestral property, does not create for the widow a right to the *share* of her husband. M. *Monhurrun Korwar* v. *Thacoorpershaud and others*. 1. Wyman. p. 244. The widow has a right to the share assigned to her separated husband. 2. W. and Bühl. p. 49. Q. 6. 7. Ib. p. 50. Q. 8.(a)

The amount of maintenance is determined by a reference to the condition of the parties, the amount of the estate &c. *D. Bungaroo Ummall* v. *Zemindar of Calastry*. No 13 of 1817. I Mad. Sel. Dec. p. 170. See also *Rajah B. V. Luchmana* v. *Rajah B. N. Naidoo* R. A. 5. of 1855. M. S. A. R. for 1855. p. 69. *Bhugwan C. Bose and others* v. *Bindoo B. Dossee* 2 Wyman. c. r. p. 360. S. C. 6. Sutherl. c. r. p. 286. 360. See also Ib. 222. 233. *Sakwatbai* v. *Bhawajee Rajee G. E. Deshmuk* 1. Bomb. H. Ct. Rep. 195. See *S. Soorjeemunnee Dossee* v. *Denabundoo Mullick* 9. M. I. A. p. 123.(b) It is not necessary that the husband's relations should maintain his widow in the same state as he would himself have maintained her. *Kalipersaud Singh* v. *Kupoor Kowree* 4 Sutherl. c. r. p. 65. Official salary is

(a) Nareda. Mit. Ch. II. S. I. 20. Mit. Ch. II. S. I. 33.

(b) Madhavya. 26 and 32. Smriti Chandrica Ch. IV. 17.

not liable to have maintenance charged on it. *Coomarasawmy Moodelly* v. *Sellumall* S. A. 98 of 1857. Mad. S. R. 1859 p. 5. *Vudda Ballarum* v. *S. V. Venkamah.* Sp. A. 123 of 1858. Mad. S. R. for 1858. p. 225. Nor will maintenance be granted when the party to be charged has only a floating and uncertain income. *Bramavarapu Krishnaya* v. *B. Venkamah* Sp. A. 142 of 1859. Mad. S. R. for 1859 p. 272. No maintenance is allowable where the property is inadequate to the charge. *C. Ramakrishnamah* v. *C Soobamah* Sp. A. 16 of 1859. Mad. S. R. for 1859, p. 82. *Veerabudra Charry* v. *Kuppamall* Sp. A. 149 of 1859. Mad. S. R. for 1859 p. 265. See acc. *Rutton C. Dhoobi* v. *S. Hurremoonee* I Wyman. c. r. C. 299. s. c. 5. Suth. c. r. p. 215. A widow receiving a sufficient pension from Government is not entitled to maintenance. *Purwathy Ummall* v. *Maynumall* Sp. A. 149 of 1856. M. S. R. for 1857 p. 69. Where the relations neglect to assign the widow a reasonable maintenance, the Court may award it. *M. Bheloo* v. *Phool Chund* 3. Beng. S. D. R. p. 223. *Stridum* is not to be taken into account in fixing the amount. 1 Bühl. p. 63. Land may be assigned for maintenance 2. Str. 15.(*a*) Str. Man: § 207. Mad. S. A. Pundits 28th February 1853. The right to be maintained by the husband's family, is not lost because the widow may have shared her husband's estate, and have supported herself for a series of years. If she should at any time fall into indigent circumstances, she can then come upon her husband's family for maintenance. *Baee Lukmee* v. *Lukmudoss Gopauldoss.* 1 Bom. H. Ct. R. p. 13. The acceptance by a widow of an allowance, besides apparel and food, does not bar her right to demand a proper maintenance according to the family circumstances. 1. Morl. Dig. N. S. p. 249 § 8. Nor if a less allowance be offered her than she has a right to expect, does she forfeit her right, by leaving her husband's house and seeking shelter in her own parent's house. *Ib.* It is said, that a wife, refusing to live with her *husband's* family without just cause, is entitled to a *smaller* rate of allowance *Anantaya* v. *Sautranna*; Sp. A. 31 of 1860. Mad. S. R. for 1861 p. 59.

She has a right to be maintained by her husband's family, though he has separated from it. *Chandrabhagabbaye* v. *Lasenath Vital.* 2 Bomb. H. C. R. p. 341. But see, *contra. post.* In *Ramchundra Dikshit* v. *Savitrabai,* 4. Bomb. H. Ct. Rep. App. Jur. p. 73, where a widow who had been supported by her father-in-law, after his death sued his eldest son for maintenance, the defence was, that as the son sued was only one of three, he was not separately liable. But the Court held that maintenance was a charge on every part of the property; and that the defendant's remedy, was by an action over, against his brothers for contribution. Where a father and son lived together, joint in food and worship, but separate in interest, it was held that the widow of the son had no legal claim upon the

(*a*) Smriti Chandrica Ch. XI. S. I. 37 and 44.

father for maintenance. *Rujjomoney Dossee* v. *Subchunder Mullick.* 2. Hyde. p. 103. There, *Norman* C. J. said, "According to Hindu Law, probably the plaintiff should be maintained in the house of her father-in-law, who ought to find her in food and raiment. But when the father and son are not joint in estate, the maintenance of the son's widow appears to be a mere moral duty in her father-in-law,to the performance of which he is not compellable by law. The absolute power of a father, as master and head of the family, over property acquired by himself, his right to distribute it at his pleasure, and to keep and reserve what he thinks fit for himself, is asserted in the most distinct manner in numerous texts—Colebrook's Digest Book V.Cap.1.Sect.2.XXIII. XXIV. and XXI. and Chap. 2. p. 88. In page 90 the commentator, Jagannatha, treats the maintenance of a family out of man's own wealth as preceptive merely, and says at page 88, that a father slighting such precepts, commits a moral offence, but incurs no civil penalty. A son's widow cannot have larger legal rights against her father-in-law than her husband would have had if alive, and such husband could not have compelled his father to give him any share of his property.

"The present case is wholly distinguishable from those where an heir takes property, subject to the obligation of maintaining persons excluded from inheritance, out of the estate of the deceased proprietor, or whom the deceased proprietor was morally bound to maintain. In such cases Hindoo Law seems to annex the duty as a burden no the inheritance in the hands of the heir, and the right of the party claiming maintenance, appears to be a legal right, analogous to a right of property. Menu, Chap. IX. 201, 202, Shamachurn's Vyavastha Durpana, page 315; Dayabhaga Chap. V. Sec. 11; Chap. XI. Sec. I. $ 49, Macnaughten's Hindoo Law Vol. 2 p. 105, 106, 116, 117 119. *Raisham Rullub* (appellant) v. *Prankissen Ghose* (respondent.) 3 Select Reports p. 33. 2. Strange's Hindoo Law, 297, and Mr. Colebrook's remark, ibid, 304.

"In a case in Macnaughten's Hindoo Law, Vol. 2 page 118, it was considered that the widow of a son who had received from her father his share of the ancestral property in his life-time, could not in a Court of law claim maintenance from the father of her husband. And in case No. 4. Macnaughten's Hindoo Law Vol. 2. p. 111. it was held that a son's widow had no legal right to alimony, or money allowance, for maintenance from the widow of the father. I think that the principle of these last cited cases applies to that now before me, and that accordingly the plaintiff is not entitled to a decree against her husband's father for a money-allowance, and consequently she must accept maintenance in such shape as the defendant chooses to give it to her, and the defendant has a right to say that he will not maintain her unless she resides in his house.

"This appears to be contrary to a case decided on the 10th Augt. 1852—Sudder Dewanny Adaw-

lut Reports p. 796, but the distinction above alluded to appears to have been overlooked by the Sudder Court though apparently not by the Lower Court. In the case of *Collydosse Dosse* vs. *Chunder Suker Bistoo*, in which Sir Mordaunt Wells made an order for maintenance, the point was apparently not argued."

Where the husband forsakes a chaste wife, she is said to be entitled to one-third of his estate. *Palen Sitty Nagoo* v. *S. Kristnadoo.* 2 Str. H. L. p. 38. Acc. *D. Narrayan* v. *J. Nagrlo* ib. p. 41. and case from Prov. Ct. of *Chittoor*. 2. Str. H. L. p. 43. and see 2 Str. H. L. p. 51. But this is denied. Macn Pr. Vol. 2. p. 110. Case 3.(*a*) An unchaste wife forfeits her right to any maintenance. *Ragava Chary* v. *Seedumall.* 9. of 1829, 2 Mad. Sel. Dec. 20. *Ilata Shavatri and another* v. *I. Narraynam Numbadri* Sp. A. 369 of 1862. 1 Mad. H. C. R. p. 372: and See Mr. *Stokes'* Note to ib. p. 374. See also No. 92 of 1863, 1 Bom. H. Ct. Rep. p. 124. 2. Macn. Pr. p. 112 Case 5. (*b*) Where a wife commits adultery, she is to be abandoned, deprived of nuptial rites, and to be divested of her nuptial ornaments and separate property. She must however be *maintained*; as must an out-caste, by his family: per *Ellis*, on a case from Zillah of *Chingleput*, 30th June 1806. 2 Str. H. L. p. 32. Many texts seem to authorize, the position, that an adulterous wife is entitled to *some* support, for bare maintenance: a "starving maintenance," as it is called. The case of *Ragava Charry* v. *Seenumal*, cited *supra* from 2nd Madras Sel. Decrees, negatives even that slight modicum of support. But it may be open to doubt, whether this decision would be up-held now, in the face of the law-texts to the contrary.(*c*) Alimony so unknown to the Hindu law. 2. Macn. p. 111. When the wife is divorced for adultery, and continues living in adultery, she is certainly entitled to nothing. *Muttammal* v. *Kamatchi Ummall*, R. A. 65 of 1864; 2 Mad. H. Ct. R. p. 337. See acc: R. A. No. 2 of 1863, Mad. S. D. 366. M. S. R. p. 139. See Str. Man § 206. Mad. S. A. Pundits. 19th August 1830, 26th January 1854. Chastity is essential in a *widow*, to entitle her to continuance of maintenance from her husband's relatives. *Ranee Bussunt Koomaree* v. *Ranee Koomul Koomaree.* 7 Beng. S. D. R. p. 144. Ib. 1 Morl. *Dig.* 441. § 28. *Kodee M. Dabia* v. *T. C. Chuchervally*; 2 Sutherl. c. r. p. 134. See Acc: *Maharanee Bussunt Komaru* v. *M. Kunnul Komaru.* 7. Beng. S. D. Rep. p. 144. (*d*) A wife who leaves her husband's house for other cause than his misconduct, cannot de-

(*a*) Yajnyawalkya B. IV. Ch. I. S. II. V. 72.
Vyavahara Mayuka. Ch. XX. 1.

(*b*) Yajnyawalkya. II. Dig. B. V. Ch. V. S. I. 1-334.
Mit. Ch. II. S. X. 14.
Smriti Chandrika. Ch. V. 42-43.
Madhavya. 35-40.
Vyavahara Mayuka. Ch. IV. S. XI. 12.
Dayabhaga. Ch. V. 19.
Dayacrama Sangraha. Ch. III. S. I. 17.

(*c*) Nareda. II. Dig. B. IV. Ch. I. S. II. V. 81
Yajnyawalkya. II. Dig. B. IV. Ch. I. S. II. V. 82.
Vrihaspati. II. Dig. B. IV. Ch. I. S. II. V. 83.
Smriti Chandrika. Ch. XI. S. I. 49.

(*d*) Nareda. II. Dig. B. V. Ch. VIII. S. I. V. 405.
Smriti Chandrika. Ch. XI. S. I. 48.
Madhavyah. 30.
Vyavahara Mayuka. Ch. IV. S. VIII. 6.

mand maintenance. *Sree Rajah Row Boochee Tinmiah and another* v. *S. R. Rau, V. Neeludry Rau* No. 2 of 1823. 1 Mad. Sel. Dec. p. 366; affirmed by the Privy Council. Alleged expulsion must be clearly and satisfactorily proved. *Ib.* See *B. Pudmanabiah* v. *B. Mooneammah* Sp. A. 84 of 1857. Mad. S. R. for 1857, p. 138. A husband need not support his wife who will not live with him. *Kalayaneshane Dabee* v. *Dwarkunath S. Chatterjee*; 2 Wyman c. r. p. 123. S. C. 6. Sutherl: c. r. p. 116. *Deel Sing* v. *Mt. Gunshun Kowur*; Beng. S. D. R. 1847; Ib. 1 Mor. Dig. N. S. p. 248, § 1. *Ahollya Bai Debia v. Duckhee Morma Debia.* 6 Sutherl. c. r. p. 37. (a) A husband's introduction of a concubine into the family house is a justificatory cause of the wife's leaving his protection, and living with her own family: per *Colebrook* and *Ellis* 2 St. H. L. on a case from *Zillah* Ct. of *Chingleput.* Maintenance was decreed to a wife who left her husband on his marrying a second wife against her consent. 1. Mad. Sel. D. p. 366. The reverse was ruled in 1. Mad. H. Ct. R. p. 375. If a man turn his wife out of doors without sufficient cause, he is bound to maintain her in her brother's house. *Rampriya* v. *Bhrigurám.* Case 1. 2. Macn. Pr. p. 108. See Acc. Case 2. (b) A woman cannot leave her husband because he is" irreligious, immoral; and unfortunate." *Broach* Court of Adawlut Ap. 10 1806. 2 Str. H. L. p. 46. (c) A widow may leave her husband's family home, (if not for unchaste purposes,) and still be entitled to be maintained. *Abalady Dabee* v. *M. Lukhymoonee Dabee* 2. Wyman. c. r. p. 49. Acc: *In re Kashee Chunder Mustofe, Petitioner*; 2 Morl. D. p. 198. ib. *C. Bysaik and another* v. *H. Dossee and C. Dossee.* 2 Mor. p. 199. ib. East's N. of cases No. 124. s. c. Morton. p. 85. See *Tickany Ramalutchmy* v. *T. Teroomalaroyadoo* and others. 1. Mad S. A. R. p. 1. Ib. Mor. Dig: N. S. 258. §. 3. (d) Where her deceased husband has not made residence with his family a condition of maintenance, it was held in *Shurnoo Moyee Dossee* v. *Gopal Lal Doss.* 1 Marsh. Beng. App. C. p. 497. that she was entitled to be maintained by the husband's relation in the house of her father. Mr. Strange, in his Manual § 209 lays it down broadly *(sed quare)* that *no* one entitled to maintenance need reside with the maintainer. § 210. For example, a widow need not reside with her father-in-law; husband's brother (S. U. Pundit 16th February 1839; 26th February 1855); son, step son, or husband's relatives generally (Decree of S. U. in A. 13 of 1817 and 17 of 1846; Pro: of S. U. 18th September 1851). § 211. Sons, whether legitimate or illegitimate, need not reside with their

(a) Nareda. II. Dig. B. IV. Ch. I. S. II. V. 63 and 59.
Menu. II. Dig. B. IV. Ch. I. S. II. V. 67.

(b) Yajnyawalkya. II. Dig. B. IV. Ch. I. S. 2 V. 72.
Nareda. II. Dig. B. IV. Ch. I. S. II. V. 63 and 59.
Vishnu. II. Dig. B. IV. Ch. I. S. II. V. 60

(c) Menu. Ch. V. 154.

(d) Yajnyawalkya. II. Dig. B. III. Ch. II. V. 122.
Nareda. II. Dig. B. V. Ch. VIII. S. I. V. 405.
Smriti Chandrika. Ch. XI. S. I. 48.
Madhavya. 30.
Vyvahara Mayuka. Ch. IV. S. VIII. 6.

father, disobedience not being a ground of forfeiture (Decree of S. U. in A. 2 of 1821).(a) And the current of cases seems to establish the point, that the widow may elect to live with her husband's relations of her own, provided she continue chaste, without forfeiting her right to maintenance. In the case of *Tudumani Dossi*, (*Vyavyhasta Darpana* 2 Ed. p. 384) in the Supreme Court of *Calcutta*, where, a childless Hindu widow, who, after the death of her husband, uncompelled by cruelty or ill-usage, left the house of the family of her deceased husband, to dwell at first in the house of her own father, and subsequently with her aunt, living with her own relations, the residence being in all respects a proper one, and her conduct being unimpeachable, was held not to forfeit her right to maintenance out of the property, which was that of her deceased husband in his life-time, and which had devolved on his heirs. In his Judgment, Sir *L. Peel.* C. J. quoted a passage from a judgment of the Privy Council: "The Privy Council has, on the subject of the right of Hindu widow to return to the home of her parents, laid down a broad rule, upon which it is not desirable to infringe. That Court says, 'it was not pretended that she had withdrawn herself for unchaste purposes. She was only fourteen at the death of her husband; his brothers were young men, and she thought it more prudent and decorous to retire from their protection and live with her mother and her family, after her husband's death; therefore it appears quite clear from the answers given by the Pundits, that she did not forfeit the rights of succession to the husband's estate on account of removing from the brothers of her late husband; that they had no right to insist on her not withdrawing herself from them in order to put herself under her mother's protection. The decisions of that Court must, of course, give the law to all Courts here." The Chief Justice goes on to say: "The answer of the Pundits which the Privy Council adopts, is that 'if a widow from any other cause but unchaste purposes ceased to reside in the husband's family and took up her abode in her parent's family, her rights would not be forfeited." The husband alone is liable to maintain the wife during his life. Neither his, nor her relations are legally bound to do so. *Iyagaru Soobaroyadoo* v. *Iyagaru Sashama* Sp. A. 140 of 1855, Mad. S. R. for 1856. p. 22. *Rangayian* v. *Kalyam Ummall* Sp. A. 45 of 1860. Mad. S. R. for 1860. p. 86. Where there is no paternal property, the widow must reside with the husband's family, and partake with them. *M. Venkatakristniah Puntaloo* v. *M. Ratnhavanatamah* Sp. A. 27 of 1847 Mad. S. R. for 1849 See. Sp. A. of 1859 Mad. S. R. 1859. p. 227 see also *C. Ramakistnama* v. *C. Soobamah* Sp. A. 16 of 1859. Mad. S. R. 1859 p. 82. K. *Ragaveeyah* v. *K. Venkyah* Sp. A. 111 of 1859 Mad. S. for 1859 p. 227. See *aliter Oojal Munnee Dassee* v. *Jygopaul Chowdree* Beng. S. D. A. R. 1848 p. 491. (*Jackson*

(a) Yajnyawalcya, 11. Dig. B. III. Ch. II. V. 122.

dissent.) Ib. 2 Mor. D. p. 249 § 11. She may visit her parents occasionally. 2. Str. 389. But when there is paternal property, she need not so reside. *K Jagganada Row* v. *K. Teeroopolumma* Sp. A. 85 of 1851 M. S. for 1852 p. 742. The obligation of a Hindú to maintain his daughter-in-law depends on his ability to do so. *Ruttan Chund Chooree* v. S. *Hurrie Munee* 5. Sutherl. c. r. p. 225. In the recent important case of *Khetramani Doss* v. *Kasinath Doss*, 2 Beng. L. R. (App. Civ. Jurisdiction) p. 15. S. C. 3. Mad. Jur. p. 308 before a full Bench, very many of the authorities (especially Bengal authorities) were reviewed, and it was held that when a Hindú died *possessed of no property*, but leaving a widow, who on his death went to reside with her own father, the widow could not maintain a suit against her husband's father for maintenance, he not being possessed of any ancestral property. This may be fairly regarded as the Leading Case on this point. It came up to the High Court on Special Appeal, the Judges differing, and being equally divided, the Chief Justice gave the casting vote. The case was then remitted to a full Bench under Sec. 15 of the letters Patent of the High Court, of 1865. *Phear* J. after reviewing all the authorities said: "It seems to me, therefore, that the view taken by the Chief Justice and Mr. Justice Macpherson is entirely correct. I am quite of opinion, notwithstanding the earnest pleading of Baboo Annada Prasad to the contrary, that the Hindú law-givers did intentionally often enjoin moral duties as distinct from legal obligations, and I agree with the Chief Justice that we must not convert these moral duties into legal liabilities. The mischief which we might do, as the Chief Justice remarks, by want of care in this respect, as very great. For instance, if we upheld the right of every widow of every son, who died during his father's life-time, to compel the father to pay her out of his property a money-allowance in lieu of maintenance, can any one fail to see that we should not only sap the very foundation of the Hindú family system, but should impose upon the father a burden most unreasonable, if not impossible, for him to bear. I may add that the Privy Council, in a late judgment, has discountenanced the supposition that every thing uttered by the old law-givers remains to this day so much positive law. Their Lordships say: 'The duty, therefore, of an European Judge, who is under the obligation to administer Hindú law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district, with which he has to deal, and has there been sanctioned by usage.' "I express no opinion as to whether any one taking by inheritance property out of which a dependant member of the late owner's family had, in fact, been receiving maintenance up to the time of the deceased's death, would or would not take it charged with the continuance of that maintenance. I apprehend that a question of this kind

would, in every case, depend upon the facts. I also say nothing as to the right of a dependant member of a family to compel the head to afford food and raiment within the family house, or in the case of forcible exclusion therefore, to make a money-payment in lieu of such maintenance. I confine myself strictly to the issue which I mentioned at the outset as being the issue of law on which the plaintiff's suit depends, and on that issue, I think the plaintiff fails to make out her right. Accordingly, it appears to me that the decision which is now appealed against, should be affirmed with costs."

And E. *Jackson* J. said; "I, also, am of opinion that the plaintiff is not entitled to obtain maintenance from her father-in-law in the shape in which she claims it, *i. e.*, as a money-allowance. The plaintiff appears never to have resided with her father-in-law as a member of his family. Her husband died while she was very young, only six years of age, and with the exception of two or three days immediately after the death of her husband, she has always resided with her own parents. As to any ill-usage she alleges she may have received, it is difficult to credit the deposition of a girl of eleven years of age relating what occurred when she was ouly six years of age. The plaintiff having, therefore, always lived separately from her father-in-law, and there being no ancestral property in the family, I cannot see how she can claim a money-allowance from her father-in-law. It may be that if she had always lived as a member of her father-in-law's family, he could not turn her out of doors in a destitute condition, and if he did so, she might compel him to give her food and raiment and house-room. All the texts which have been quoted for the appellant seem to me to go no further than this, and it may even be that if the plaintiff had, after living as a member of her father-in-law's family, been obliged by ill-usage to leave it, that then she would be entitled to a money-allowance in lieu of the food and raiment which the father-in-law was bound to give to her. But it is quite clear to me upon the statement of the plaintiff herself that she never has been a member of her father-in-law's family; and that even the treatment she alleges she received, contains no sufficient ground for her leaving her father-in-law's house. The plaintiff has always been, in fact, a member of her own father's family, and has always been maintained by her own father, and is still being maintained by him. I am not satisfied that she is, in any way, in want of actual maintenance. Indeed she does not ask for it. She asks that while she is being maintained by her own father, her father-in-law may be required to pay her a monthly allowance in money. No text has been quoted which, in my opinion, supports any such claim, and I would, therefore, dismiss the plaintiff's suit with all costs."

It may be useful to note that the following cases were cited and commented on in this leading Case. *Rajamunani Dossee* v. *Sitchundra Mullick* 2. Hyde p. 103. (widow refusing to live in father-in-law's house cannot

claim maintenance) *In re Rhamdan* v. *Bhattacharji* 2. S. D. R. (1852). P. 796. (*contra*). *Massumut Bibi* v. *Phool Chund* 3. Sel. S. D. R. 223, widow's right according to *Mitackshara*, where family joint, and account according to family circumstance (*Rai Sham Ballah* v. *Prankrishna Gose* 3. Sel. S. D. p. 33, (widow of son pre-deceasing her, entitled to food and raiment only.) (*In re Mussumut Hemlata Choudrain* 4. S. S. D. R. p. 19. (widow of son pre-deceasing father entitled to maintenance.) *Ujalmani* v. *jay Gopaul Chundry* S. D. R. for 1848. p. 491. (widow of brother pre-deceasing father entitled: but voluntarily withdrawing from protection of husband's relations forfeits right.) *Harasundari Guptha* v. *Nabagobind Sen*. S. D. R. for 1850. p. 422. (a case as to amount of maintenance (*Shamsundari Debi* v. *Ahilyia Dai Debi* S. D. R. for 1858: p. 1220. (a widow does not forfeit right, where she leaves protection on account of ill-usage.) *In re Sibasundra Davy*. 2. Tayl. and Bell P.190.) "food and raiment" so ambiguous, that a reference was given as to proper amount.) *Kudumani Debia* v. *Tarachund Chuckerbutty* 2. W. R. 134.)widoo may live (chastely) with husband's relation or her own, and be maintained.) Ib. *Ahalyia Bai Debia* v. *Lakhimani Debia* 6. Sutherl. c. r. p. 37. In re *Jadumani Dasi* Vyavyhasta Darpana 2nd Ed. Ib. p. 384. *Swarnamayi Dasi* v. *Gopal Lal Dos* 1. Marsh. 497 : Ib. *Kamalamani Dossi* v. *Bodhinarayanan Mozundar*. 2. Mackay p. 190. (daughter-in-law at least entitled to food and raiment.) Following this case, it was held that a widow could not claim maintenance from her husband's brothers, without residing with them. *Umacharan Choudry* v. *Nitambini* Debi 2. Beng. L. R. (Short notes p. 11.)

According to the *Alya Sultana* law, prevailing in *Canara*, and the *Maramookatayem* law in *Malabar*, wife living with her husband, is not entitled to be maintained by her own family. The custom and law of marriage and inheritance on the Western coast are very peculiar. The females usually reside in their own families. (Str. Man § 388.) The case about to be quoted throws much light on the curious state of society in that locality. *In Suben Hegadu* v. *Tangu*. Sp. A. No. 238 of 1868 in the Madras High Court, 4 Mad. H. Ct. Rep. p. 196. The Court said;

"The plaintiff and the defendants in this case are members of a family which is governed by the *Alya Sultana* system; and the question the Court is called upon to determine is whether the plaintiff is entitled to a separate allowance for maintenance out of the income of the family property whilst living *with her husband*, apart from the family.

"The suit was obviously not brought to recover the necessary means of support, but to obtain, under the name of maintenance, the *separate enjoyment* of a portion of the income of the property, equivalent to the share of it which the plaintiff had failed to recover by her suit for a division.

"The *Alya Sultana* system of Canara, unlike, it seems the kindred *Maroomakatayem* system in Malabar, (*Strange's Manual section* 388) *permits*, but does not

require married women to reside with their husbands apart from their own families; but that it is not an established custom that maintenance should be afforded by their families whilst they are so resident.

"The rule of the law derivable from the recognised work of authority *Bhutala Pandeya*, (which we regret to find is still untranslated into English) and decided cases we take to be; that the legal right to the family property is vested in the female members of the family jointly, but for little other practical purpose than regulating the course of succession. No *severance* of the joint estate can be effected compulsively; and the possession and control of the property belongs exclusively to the *Yejaman*, or manager of the family, who is ordinarily the senior of the female members; but subject to the obligation of providing proper support for all the other members; and they individually have no right to anything beyond such support.

"So far the law appears to be settled; and imports clearly, we think, the preservation of the *unity* of family, as the only effectual mode of securing to the members severally a full share of the beneficial enjoyment of the joint estate. The obvious effect of allowing one or more members to quit the family, and live apart, on a portion of the income of the estate, sufficient to support a position like that enjoyed by the other members, would be to reduce the benefits to the family, in a greater or less degree, according to the number of the members who might choose to live separately on such allowances:—And nearly as much so as by apportioning shares of the *corpus* of the property on a division. It seems to us, therefore, that the peculiar beneficial interest of the members individually in the family property is, in its nature, *incompatible with separation from the family*.

"But as bearing against this view, reliance was placed by the Vakil for the respondent, on the passage from *Bhutala Pandeya*, which is to be found accurately translated in the 4th *Volume of the Mad: H. C. R.* p. 30. "The other living persons shall act in union. In this, if misunderstandings arise between the elder and younger sisters the elder shall provide the younger with a house and house-hold articles, and have the management herself, having a right (or claim) to *urisire*." This passage we think imports no more than that the senior member should, in case of disagreement, charge the house-hold arrangements in the way pointed out, for the sake of the quiet and good order of the family. Read with the context, it is in our opinion a confirmation of the view, that living in the circle of the family, under the management of its head, is necessary to the rights of support. Whatever, too, there is to be found of express authority on the question, supports this view. The judgments of the Civil Court, and this Court, in the case of *Kumvagata* v. *Arranjaden*, indicate the strong impression of two judges conversant by long experience with the customs of Malabar, that the members of a family governed by the *Maroomakatyem* law, are only entitled to maintenance

in the family house. Again in the Chapter on *Malabar* law in the *Manual* by *Mr. Strange,* who had also considerable judicial experience in Malabar, it is laid down (*section* 388) that "females whether in alliance with males or not reside in their own families:" and we have no reason to suppose that there has been any distinction in that respect between the *Marumakatayem* and *Alya Sultana* systems. We are on the contrary strengthened in concluding that both systems enjoin the same condition. *Mr. Strange* in the same chapter, *section* 392. states that "in its details the law of *Alya Sultana* corresponds with that of *Maroomakatayem,* saving that the inheritance vests in the females, in preference to the males, is in practice better carried out in *Canara,* where the management of property vests ordinarily in the females;" and this is confirmed in the judgment of Mr. Justice *Holloway,* in *Munda Chitty* v. *Timmajee Hensu,* 1 *Mad. H. C. Rep*: 380. Referring to the *Alya Sultana* system, he observes. "This system of inheritance differs only from that of Malabar in more consistently carrying out the doctrine that all rights to property are derived from females."

"It remains to consider, whether, for any special reason, arising out of the relation of husband and wife, under the *Alya Sultana* system, a wife's residence with her husband should not be treated as a separation from her family. The relation is, in truth, not marriage, but a state of concubinage, into which the woman enters of her own choice, and is at liberty to change when, and as often as she pleases. From its very nature, then, it might be inferred as probable, that the woman remained with her family, and was visited by the man of her choice; but the case in this respect is not left to mere probability. Such has undoubtedly been the invariable habit under the Maroomakatayem law; and although women in *Canara,* under the *Alya Saltana* system, do, it seems, in some instances, live with their husband; still there is no doubt that they do so of their free will; and that they may at any time rejoin their own families. We do not therefore see that residence with a husband can be regarded differently from any other separation by the voluntary act of the wife; and this conclusion is strengthened by the fact that *Bhutala Pandeya* is silent on the subject of residence after marriage.

"The ground of the husband's non-liability for maintenance, on which alone apparently the P. S. Ameen's decision rests, is we think altogether unsound. He may be right in saying that a wife cannot legally be maintained out of the funds belonging to the family of her husband, for the very reason that living with the husband is not a necessary duty of the wife. It does not however follow, as the Civil Judge remarks in his Judgment, that a husband is not bound to afford necessary maintenance to the woman from his self-acquired means, so long as she continues to live with him as a wife. It will probably be found that the general law does impose such an obligation; but even supposing that it does not, still, his non-liability to support

her, could not alter in any way the legal effect of the wife's residence with him, or her right to maintenance out of the property of her family. "For these reasons the plaintiff is not, in our Judgment, entitled to enforce an allowance, as for maintenance, from her family."

Maintenance may be well secured by an assignment of part of the husband's lands. *Aroonachella Graminy* v. *Chinacooty* Sp. A. 75 of 1855. Mad. S. R. for 1855. p. 160.(a) And the Court may award a gross sum for the purpose, without setting apart a fund for the widow's life, as would be done in Chancery. *Rampershad Iewarry* v. *Theochurn Doss.* 10. M. I. A. 490. See also *Mussumaut Bheloo* v. *Phoolchund.* 3. Beng. S. D. A. Rep. p. 223. There are three cases cited by Sir *F. Macnaghten* in his *Considerations, Sree Mootee Mendooda-ne Dabee* v. *Joynarain Puckrassee* (p. 60.) *Cunjhunnee Dossee and Belass Dossee* v. *Gopeemohun Deb and Rajah Rajchristna* (p. 62) and *Seebshunder Bose* v. *Gooroopers and Bose* and others, p. 64, which show that the Supreme Court would not leave the widow at the mercy of those whose duty it is to maintain her; but that she is entitled to an account, and to have her maintenance secured. From this it seems to follow, that she would be entitled to an injunction against *waste*, to restrain her husband's representatives from making away with the estate, or at least to compel them to give security for the due payment of her maintenance. What the Supreme Courts did, the High Courts will do on their original sides; and I see no reason why the Mofussil Courts, under the Civ. Proc. Code may not give relief of a similar kind, notwithstanding the remarks of the Privy Council in the case above quoted from 10. Moore's I. A. A widow may sue for back maintenance: *Venkopadaya* v. *Kavari Hengusu* Sp. A. 433 of 1863. 2 M. H. Ct. Rep p. 36; over-ruling decisions of Mad. Sudr. Ct. 4 of 1860, and 31 of 1861. No 92 of 1863. Sp. A. over-rules Sp. A. 29 of 1855. See *Deel Singh* v. *Mt. Gunshan Kowur.* 1. Morl. Dig. N. S. p. 248. § 1. The same point has been decided by the Bomb. H. Ct. in *Sakwarbai* v. *Bhavanjee R. G. L. Deshmull.* 1. Bomb. H. Ct. R. p. 194. (over-ruling the late Sudder Decision in 1 *Morr.* p. 247.) It was also held in 3 Sutherl. that a suit will lie by a widow in a Small Cause Court for her *arrears* of maintenance. A widow need not constantly be bringing fresh suits for the payment of her annual maintenance. A decree for maintenance may provide for future maintenance. *M. Sinthajee* v. *Pondily Hooran and others,* 4 Mad. Jur. p. 95 the Court said, "The practice of all the Indian Courts has been for very many years to make decrees for payment of future maintenance to Hindú widows, either by directing the periodical payment of a fixed sum, or by setting apart a portion of the property and assigning the interest or proceeds thereof to the widow for her maintenance. One instance is afforded in the case reported at page

(a) Smriti Chandrica Ch. IX. S. I. 37 and 44.

36 of the 2nd vol. of Madras H. C. Reports (S. A. 433 of 1863), where this Court approved of the decree of the Principal Sudr Amin ordering future maintenance at 3 Rupees a month from the date of the plaint; and observed that "there is no authority for saying that a woman entitled to maintenance must, to obtain the sum to which she is entitled bring annual actions." That observation was, no doubt, made with reference to the question raised in that suit whether the plaintiff could recover arrears of maintenance; but if it be true that the Courts have authority to decree payment of a fixed sum per month for maintenance, it follows that such decrees must be capable of execution, in the same way as decrees for payments of money by instalments may be executed, (See Civil Pro. Code Section 194; and Referred case 25 of 1863, Madras High Court Rep. vol I, p. 459.)

"There is nothing which we can discover in the Stamp Act of 1867, or in the Civil Procedure Code, to prevent the execution of such a decree; and if the arrears of maintenance can be recovered by process of execution in the suit in which the decree was passed, then they must be so recovered and cannot be made the subject of a fresh suit (Section 11 of Act 23 of 1861.)

"A question might arise as to the jurisdiction of a Small Cause Court to pass any such decree, on account of the limit as to amount prescribed for Small Cause Courts; but in the particular case under reference, no objection on that ground has been, or can now, be taken; and it is unnecessary therefore to consider that point."

A wife or widow in whom the right has vested is of course liable to have it divested for proved misconduct; for her obligation as to chastity &c., is a continuing necessity. In the case just quoted the Court thus glanced at this contingency.

"Another objection which may be suggested is, that such decrees, providing for the payment of maintenance for a future indefinite period, could not be enforced if at a subsequent period the widow by misconduct should forfeit her right to maintenance; but this objection has never been considered sufficient to prevent the passing of such decrees; and probably in a case of proved misconduct sufficient to destroy the right, the Court which passed the decree would be as much at liberty to entertain that objection in answer to any application for execution in the same suit, as the same Court or another Court would be at liberty to entertain it in a fresh suit."

A suit will lie for arrears of maintenance in a Small Cause Court. *Ramachundra Dikshit* v. *Savitribai* 4. Bomb. H. Ct. Rep. App. Jur. p. 73. *Judalkon Ranchod Mulji* v. *Hira Mulji*. Ib. p. 75. But a Small Cause Court has no jurisdiction to try the *right* to maintenance, where that is denied. *Bhagwan Chunder Bose* v. *Bindoo Bashinee Dossee* 6. Sutherl c. r. p. 286. S. C. 2. Wyman 360. It may be barred by the law of limitations. *Luchmi Umall* v. *Gonagu Anda Naick*. 4 Mad. Jur. p. 167. The widows of a *Goorookul's* sons are entitled to maintenance, chargeable on the in-

come of the office. *Sooboo Goorookul* v. *Tayoo Ummall and Camato Ummall* Sp. A. 108 of 1856. Mad. S. R. for 1857 p. 80. The widow of an illegitimate son of a European father by a Hindú woman, the son following the religion of the mother, is entitled to maintenance; because the law which governs such a *status*, is the Hindú. *Boyee Ummall* v. *Ootaram* R. A. 13 of 1858. M. S. R. for 1858 p. 125. A husband cannot give all his property to his wife for her maintenance, to the prejudice of his heirs. *Soobamall and another* v. *Sooboo Chetty* R. A. 2 of 1853. M. S. R. for 1853 p. 271. A widow cannot legally agree to forfeit her maintenance. *Narrayna Chetty* v. *Parvatumall*. Sp. A. 57 of 1860. Mad. S. R. for 1860 p. 196. A Dancing girl is not bound to support her brother's widow. 88. of 1858. M. S. R. for 1858 p. 175. A widow of a separated son has no claim on his father for her maintenance. See the case of *Chandra Bhaya Bhayee* v. *Kasemath Vital* 2 Bomb. H. Ct. R. p. 341. *Supra* 2 Hyde 103. In a divided family, a widow can only claim maintenance from that branch of the family to which she belongs. *P. S. Nhayada* v. *Rama Luchmana*. R. A. 28, 28*a* 29*b* and 30 of 1859. Mad. S. R. for 1860 p. 91. And See 2. McNaghten. Pr. p. 116. Case 7. *M. Chourassee Kurmoo Bukul and another*: v. *Kumalamuni Dassee* v. *B. Mugmooadar and another*. Ib. p. 118 Case. 11. Widows in undivided families are only entitled to maintenance. See 1. W. and Bühler. 75. Ib. 78. A brother-in-law is not bound to provide for his sister-in-law. Sp. A. 170 of 1860 Mad. S. R. for 1861 p. 12. A widow has no claim upon her step-grandson, or her step son's widow for maintenance, while she has a step-son living; who alone is bound to maintain her, even though the others are in joint possession with him of her husband's estate. *Kishnachund Chowdree* v. *M. Rookunnee Debia*. 3. Beng. S. D. A. Rep. p. 70. 2. Macn. 31. Ib. 118. She cannot inherit directly to her step-son; but his heirs are bound to maintain her 2. Macn. p. 117.

A widow, entitled only to maintenance, cannot make contracts for her necessary support, binding on the heir in possession of the family property, and who is bound to maintain her. *M. Ramasawmy Aiyar* v. *Meenatchee Ummall* Sp. A. 257 of 1864. 2 M. H. Ct. R. p. 409. There the Court said: "We think there is no principle or rule of Hindú law which recognises any authority in a widow, entitled only to maintenance, to make contracts for necessary supplies binding upon the heir in possession of the family property and liable to maintain her.

"We have been referred to several texts and the commentary thereon in *Colebrooke's Digest*, book I, chapter 5, relating to the liability of heirs to pay the proper debts of the person from whom they inherit property, and to the payment of debts contracted for necessary family expenses whilst the family are living together, and during the prolonged absence of the head of the family. But those passages have no application to the present question. The heir no doubt takes the property subject to liability to the

just claims of creditors as well as to those who have charges upon it; and in the case of necessaries supplied to a family the liability rests on the ground that one member acts as the agent of all and binds all. The second defendant's husband and the second defendant herself were undoubtedly liable to the first defendant for her maintenance, but upon the decision adverse to the first defendant's claim in the former suit, the second defendant ceased to be liable in respect of the time during which the plaintiff's advances were made. Here the whole question is whether in law the relation of debtor and creditor was created as between the second defendant or her husband and the plaintiff, and for that no authority has been or can, we think, be shown; and to hold so would lead to results seriously opposed to the principle of dependence and control which underlies the law governing the relationships of a Hindú family. We are, therefore, of opinion, that the second defendant is not liable to the plaintiff's claim in this suit."

2nd. As to the maintenance of other members of the family entitled to, and requiring it.——A mother is entitled to be supported by her son; and this even though she quits his protection without sufficient cause. *Dimurla Bungaroo Ammall* v. *Zemindar of Calastry* 1. Mad. Sel. D. p. 170.(a) Daughters and daughters sons are entitled, in undivided families living under the *Mitacshara*. *Koomud Chunder Roy* v. *Setakanth Roy* Sutherl. Full B. Rule. p. 70. Sons must maintain parents. 2. Macn. p. 113.(g) A widow succeeding as senior, must maintain the other widows. 1. W. and Büh. p. 24. Brothers, if property has been derived from the brother. Mad. S. D. A. Pundits 13. Nov. 1854. Str. Man. § 202.(h)

A step-mother is entitled. 1. Bühl. p. 24.(b) Unmarried daughters are entitled to maintenance out of the family fund; but if a daughter live apart from her father without sufficient cause, she loses the right. *Ilata Shavari* v. *Ilata Narayanen Nambudiri*. 1. Mad. H. Ct. R. p. 372. Unmarried sisters are entitled to have their nuptial expenses defrayed 2. Str. p. 313.(c) A concubine is entitled to maintenance. 1. W. and Bühl. 135.(d) Legitimate, sons in undivided families, must be maintained, nor can maintenance be with-held from a son for simple disobedience. *Pursuram Deo* v. *Sree Cheytaina Anunga Deo* 1. Mad. Sel. D. p. 277.(e)

The amount may be reduced to the lowest, if there be no just ground for the son's removal from the family dwelling. Ib. Sons, legitimate or illegitimate, need not reside with their father, disobedience not being ground of forfeiture. Ib. Str. Man. § 211. Illegitimate sons of the three upper or regenerate classes, not

(a) Smriti Chandrica. Ch. IV. 16 and 17. Menu. Ch. IV. 251.
(b) Smriti Chandrica. Ch. IV. 14. Dayacrama Sangraha. Ch. VII. 3.
(c) Smriti Chandrica. Ch. IV. 18 and 36.
(d) Mit. Ch. II. S. I. 27 and 28. Dayabhaga. Ch. XI. S. I. 48. Vyavahara Mayuka. Ch. IV. S. VIII. 5.
(e) Mit. Ch. I. S. I. 27.
(h) Smriti Chandrica. Ch. XI. S. I. 34.
(g) Yajnyavalcya. II. Dig. B. V. Ch. II. V. 477.

being entitled to inherit, are entitled to maintenance. *Pershad Singh* v. *Ranee Muheeree* 3. Beng. S. D. R. 132. Acc. 2. Macn. p. 119. 2. Str. p. 195. 198. 200.(a) In *Sakaram Trimbak* v. *Ranu Wullud Vital Appojee* 1. Bomb. H. Ct. R. p. the rule seems to be laid down broadly with reference to all Hindús. It does not appear from the case what caste the Defendant was of. In *Chowturya Run Murdun Syn* v. *Sahub Purhuland Syn.* 7. Moore's I. A. 18 it was held that the illegitimate son of a *Khatri*, one of the three regenerate classes by a *Soodra* woman cannot inherit, but is entitled to maintenance: See also *Pershad Singh* v. *Ranee Muheeree*. 1. Beng. S. D. R. p. 28 and note to p. 29. 2. Macn. p. 119. In *I. Valingapooly Taver v Ramasawmy Pandea Talaver and another* 1. Mad. H. Ct. R. p. 478:—affirmed on appeal by the Privy Council—(4. Mad. Jur. p. 328), it was held that the illegitimate children of the Soodra class may inherit, and have a right to maintenance. In *Muthusawmy Tagaviri Yettapa Naikar* v. *Venkatasubba Yettia* 2. Mad. H. Ct. R. p. 137. it was unsuccessfully contended before the Madras High Court, that the Plaintiff had misconceived his action. That he sued for maintenance; but as an illegitimate Soodra, his real claim was for the inheritance. But the Court held, that whatever might be his claim to the inheritance, he was *at least* entitled to maintenance; and of this opinion, was the Privy Council. See Acc. 1. Bühl. 290. 291. So the son of a Brahmin by a Soodra woman is entitled. 2. Str. 201. In *Ramanini Umall* v. *Colunda Numbiar*, on appeal before the Madras High Court in 1866, (not reported and now before the Privy Council, on appeal) it was held that the illegitimate son of a Soodra by a dancing girl, whom he had taken from the Pagoda and kept, would in the absence of any other heir, after his father's widow's death succeed to the property. He would, therefore, in the interim be entitled to be maintained. A doubt has been entertained to the *status* of an illegitimate son of a *Soodra*, begotten on one, *not* a female slave. In *Muthusawmy Tagaviri Yettapa Naikar* v. *Venkata Subba Yettia* 2. Mad. H. Ct. R. p. 293, the Court said: "A passage in Sir W. Macnaghten's Hindu Law, apparently quoted with approbation by Sir E. Ryan (VII Moo. I. A. 49) who, as an ex-Chief Justice of Bengal, not unnaturally attaches very great weight to Macnaghten, distinguishes between the unborn son of a slave and one born of another woman. After shewing the sharers which would be taken by the Sudra's illegitimate son in various cases, Macnaghten says, "If the woman were not his female slave the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance." (Vol. II. p. 15 note.).

"In his first volume, at page 18, the learned author states the same doctrine and quotes in its support the Mitacshara, Cap: 1, Sec: XII, which declares the circumstances in which the son of a Sudra by a female slave is to inherit. The

(a) Mit. Ch. I. S. XII. 3.

word "female slave" is used throughout the passage, but the not very delicate discussion in Colebrooke's Digest (Vol. II. 221, &c.) of the circumstances and employments which, according to some commentators, distinguish slavery from mere servitude, seems to show that no peculiar weight ought to be attached to the word "slave." Again, if the Sanscrit word in the Mitacshara is *Dasi* as we were informed at the bar that it is, a reference to any dictionary will show that the word means "a female of the Sudra tribe, the wife of a fisherman and a concubine." Even if it were *Dasa* as the masculine noun means equally "a fisherman" and "a servant," there seems no reason for supposing that the feminine does not mean a female servant, although "female slave" is the only meaning given to it by Wilson in his dictionary. Without a careful collation of the original it would be difficult to determine this point. If the restriction is really laid down by the authorities, it is probably on account of the difficulty of tracing son-ship where the woman is not absolutely under the reputed father's power.

"We may again advert, as explaining the apparent narrowness of the definition, to the principles on which the status of a slave was held in Hindu Law to follow upon certain occupations and conditions. The son imperfectly adopted was held to be in the condition of a slave, yet a person so imperfectly affiliated would unquestionably be entitled to maintenance. Assuming him to be excluded from the inheritance, it seems impossible to say that he would not be entitled to maintenance. We find from *Murdun Singh* v. *Purhulod Singh* (VII Moo. I. A. 18) that the illegetimate son, even of a man of the regenerate tribes, is entitled to maintenance. It cannot be disputed, as indeed it is in that case as throughout all the authorities admitted, that the illegitimate son of a Sudra stands in this particular in a better condition than one of a twice-born man."

This question was argued by the Principal Sudder Ameen of Vizagapatam in *Numbala Kristnama and another* v. The *Maharaja of Vizianagrum and others*, (see the judgment set out in note to 1. Mad. Jur. p. 130 and the cases and authorities cited there) and it was held that the same law applied whether the son was begotten on a slave, a concubine, or a prostitute. The case came up before the Madras High Court on appeal. See 4. Mad. Jur. p. 130. when the judgment of the P. S. Ameen was approved of; though the case was decided on another point. In the appeal before the Privy Coucil from the case quoted *supra*, from 2. M. H. Ct. R. p. 293. the Court held that the illegitimate son of a *Sudra* by a concubine, *not being his slave*, is entitled to maintenance. See *M. J. Yettapa Naicken* v. *Vencataswara Yettapa*. 4. Mad. Jur. p. 137.

An illegitimate son, however, by an incestuous intercourse is not entitled to inherit. *Datti Purisi Naidoo and others* v. *Datty Bungaru Naidoo and others*. 4. Mad. Jur. p. 136. It is conceived that he would be entitled to maintenance, as only out-castes, and their offspring, born subse-

quent to degradation, are excluded I. Str. 234. Mothers of illegitimate children are entitled to be provided for; Concubines; *Oomras Singh* v. *Mt. Man Koonwar*. 2. N. W. P. R. p. 136. Also one adopted, but who may prove disqualified for adoption; and the son of such disqualified person (I. 82. 97, 98). Also the widow and daughters of a son (S. U. Pundits 10th April 1845). And a brother's family, if property have been derived from the brother (S. U. Pundits 13th November 1854). A son's widow is bound to maintain the father (S. U. Pundits 1st December 1853). Undivided nephews have to maintain their uncle's widow, if son-less (S. U. Pundits 30th August 1845). And the general rule of law is, that all persons, (other than out-castes) disqualified from inheriting by various disabilities, are entitled to maintenance. Even the childless wives of such persons are to be provided for; Str. Man. § 198. and their daughters maintained and married: (a) "so anxiously careful," justly writes Sir T. Strange, (Vol. 1. p. 235) "has "the Hindu law been, that there "shall exist no final distress in "families, while means exist to "prevent it, even in the instance "of the most undeserving!"

(a) Mit. Ch. II. S. X. 5-12 and 13. Dayabhaga Ch. V, 10-11 and 12, Smriti Chandrica Ch. V. 20.

SINGAMMA v. RAMANUJA CHARLU.

SPECIAL APPEAL No. 206 OF 1868.

4. MADRAS HIGH COURT REPORTS P. 165.

V. SINGAMMA (and another) *Special Appellants.*

versus.

VINJAMURI VENKAYACHARLU, (natural father and guardian of SRINIVASA CHARLU *alias* RAMANUJA CHARLU) *Special Respondent.*

In order to establish a valid adoption in a Brahmin family, proof of the performance of the datta homam is not essential.

The giving and receiving a boy who is capable of being adopted is sufficient to constitute a valid adoption according to Hindu Law.

This was a Special Appeal against the decree of G. D. Leman, the Acting Civil Judge of Guntoor, in Regular Appeal No. 86 of 1865, confirming the decree of the Court of the District Munsif of Bapatla in Original Suit No. 736 of 1864.

Parthasarathy Aiyangar, for *Rama Row,* for the special appellants, the 1st and 2nd defendants.

The facts sufficiently appear from the following

JUDGMENT:—This was a suit to recover certain inam lands which had been alienated by the 1st defendant to the 2nd and 3rd defendants. The plaintiff sued as the adopted son of 1st defendant's deceased husband, the alleged adoption having been made by her under authority from her husband. The adoption was denied, but both the Lower Courts have found that an adoption in fact took place.

When the case came first before this Court on special appeal, we considered the finding of the Lower Appellate Court ambiguous, and accordingly we sent the case back to the Civil Judge for a distinct finding upon the issue,

whether there has been any valid adoption of the infant plaintiff according to Hindu Law. This issue has now been found by the Civil Judge in the affirmative; but he adds that it was not proved that the datta homam or any other ceremony, except giving and receiving, was performed at the time of the adoption; and the ground of special appeal is that the adoption, even if true, is invalid, inasmuch as the datta homam was not performed. It is necessary therefore for us to decide in this case whether in order to establish a valid adoption in a Brahmin family, proof of the performance of the datta homam is essential; and, upon a consideration of the authorities, we are of opinion that it is not.

In the two celebrated treatises on adoption translated by Mr. Sutherland (the *Dattaka Mimansa* and *Dattaka Chandrika*) the observance of the prescribed solemnities (including a burnt sacrifice and recitation of the prayers denominated Vyakrit,) is certainly treated as essential to the validity of the adoption, and to the establishment of the filial relation, in the case at all events of the son given. But the writers of these treatises depend mainly upon the texts of *Vasishta* and *Cannaka* as the authorities for their position, and these texts enjoin in similar terms the observance of various other solemnities on the occasion of an adoption, some of which appear not to be regarded as essential by any commentator.

And in the *Digest* of *Jagannatha* there is a very elaborate commentary on this very text of *Vasishta*, in which he concludes that the oblation to fire with holy words from the Veda is an unessential part of the ceremony. In the Madras edition (1865) of Mr. Colebrooke's translation at p. 389, the passage will be found in which *Jagannatha* states that the adoption is not void if that oblation be omitted; and at p. 391, this passage "If the declared intention be expressed in these words, 'I give him to you as a son, and if the acceptor's intention be thus expressed, 'I take him as a son' he becomes a son; nothing else is required."

This view of the subject has long been entertained by the principal English Authorities. *Sir T. Strange* in his Judgment in *Veerapermal Pillay* v. *Naraina Pillay* 1 *Notes of Cases p.* 117, says "The operative part of the ceremony seems to be the giving and receiving, the rest is matter of customary solemnity, of decorum, of charity and conviviality varying under different circumstances in different parts of India, or at least in the idea of different

Pundits and Shastrees, but one opinion is common to all which is indeed frequently repeated in the late translated digest, viz, that nothing of this kind is so essential to the act as, being mistaken or omitted, can have the effect of invalidating the adoption." In another part of the same judgment at P. 133, with reference to the question as to the proper age of the child he says :—"This question of age appears to have undergone a good deal of investigation in the late case of the Rajah Nobkissen at Bengal, in which the mere act of giving and receiving seems to have been considered as alone constituting a valid adoption without regard to limitations or ceremonies as in any degree essential *unless in the case of Brahmins;*" and the same learned Judge in his work on Hindu-Law (we quote from the edition of 1830 P. 95) says further :—"There must be gift and acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary, for as to notice to the rajah and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession, and even with regard to the sacrifice of fire, important as it may be deemed, in a spiritual point of view, it is so with regard to the brahmin, only; according to a constant distinction in the texts and glosses, upon matters of ritual observance, between those who keep consecrated and holy fire and those who do not keep such fires, *i. e.*, between brahmins and the other classes, it being by the former only that the datta homam with wholy texts from the Veda can properly be performed, as was held in the case of the Rajah of Nobkissen by the Supreme Court at Bengal. And even with regard to brahmins, admitting their conception in favor of its spiritual benefit, it by no means follows that it is essential to the efficacy of the right for civil purposes; but the contrary is to be inferred, and the conclusion is that its validity for these consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only son or the eldest son of the giver, the prescribed ceremonies not being essential. Not that an unlawful adoption is to be maintained, but that a lawful one, actually made, is not to be set aside for any informality that may have attended its solemnization."

In support of this conclusion, Sir T. Strange refers not only to the *Digest* of *Jagannatha*, but to the opinions of Mr. Colebrooke and Mr. Ellis, which are collected in the 2nd volume and those opinions, though not all of them in

terms quite consistent, seem to us, when considered together, fairly to warrant the conclusion.

At page 126 Mr. Colebrooke quotes the 3 *Digest* 244. "The inadvertent omission of an unessential part, as sacrifice is, even where it is enjoined, does not vitiate an adoption," and adds, "the adoption being complete, it cannot be annulled." Mr. Ellis says:—"Certainly, however defective the ceremony, and however small in consequence the spiritual benefit, the act of adoption cannot be set aside on any account whatever, a *fortiori* not on account of any informality." Further at p. 220 we find amongst the remarks of Mr. Ellis upon the ritual of the datta homam extracted from the *Datta Mimansa* this statement:—"He concludes the result, with respect to practical use, to be that if the performance of the datta homam be established, the adoption is established; but if otherwise, that the converse does not hold good, and that further evidence may be adduced, adding that in no case can the omission of the ceremony affect an adoption in other respects valid; but that if not performed, when the adoption is from another gotram, it would seem from analogy that the son, so adopted, must be Anitya Datta." The supposed distinction between the Nitiya and Anitya Datta is pointed out in the Pundit's answer at p. 121, and Mr. Ellis remarks thereon at p. 122 quoting a text from the *Nirnavasindhu*; and assuming it to exist for any practical purpose, it clearly affects only the status of the descendants of the adopted son, and not that of the adopted son himself. In the present case we do not know whether the adopted son was or was not of the same gotra, and it is unnecessary to follow further the analogy suggested by Mr. Ellis.

The opinion of Mr. Colebrooke at p. 155 that "The unintentional omission of some part of the ceremonies by the adopter would hardly invalidate the adoption, though the wilful omission of the whole by him might have that effect," appears by the context to have reference to an adoption intentionally incomplete and to the omission to perform the ceremony of tonsure and the like in the family of the adopter. The same remark applies to the observation of Mr. Colebrooke at pages 113 and 114. "The answer (of the Pundit) presumes the adoption to have been actually made, and the circumstance stated authorize the presumption. It would be otherwise if it were proved that the party had changed his intention before the essential rites of adoption took place and purposely avoided performing them." Mr. Ellis in his remark on

the same case (p. 114), explains the sense in which he considers the datta homam to be necessary by saying, that " with brahmins it is indispensably requisite to produce spiritual benefit." It is, we think, in the same sense that the observation of Mr. Ellis at p. 131 must be understood, to render it consistent with the opinion expressed by him in other passages. In Mr. NcNaghten's *Principles of Hindu Law* (Madras edition of 1865) at p. 69, it is said, " It is lastly requisite that the adopted son should be initiated in the name and family of the adopting party with the prescribed form and solemnities ;" and in a note reference is made to the *Summary of Hindu Law*, p. 52d, and the *Elements of Hindu Law*, p. 82, for an enumeration of the ceremonies enjoined at adoption, adding, " but the exact observance of these ceremonies is not indispensable," for which *The Digest*, vol. 3. p. 324, and *The Elements of Hindu Law*, appendix pp. 101, 106, are cited.

Further, in the Judicial Committee of the Privy Council as long ago as 1834, the same view appears to have been recognised ; for in 2 *Knapp* p. 290, we find Lord Wynford in delivering judgment in *Sootrungun Sutputty* v. *Sabitra Dye*, adverting to the fact that " neither written acknowledgments nor the performance of any religious ceremonial are essential to the validity of adoptions."

On the other hand, Mr. Justice Strange in his *Manual* expresses an opinion that the omission of the datta homam will invalidate an adoption made by the three higher castes ; but he does not cite any authority in support of the position, and we are not aware of any other authorities at all equal in importance to the two treatises on adoption already mentioned.

Even Sir Francis McNaghten in his *Considerations*, where he has criticised so elaborately and severely the judgment of Sir T. Strange in *Veerapermal Pillay's* Case on many questions connected with the Hindu Law of adoption, has not explicitly stated his opinion that any particular ceremony is essential to the validity of an adoption. He refers (p. 119) to the statement of *Vachipati* that " Sudras are incompetent to affiliate a son from their incapacity to perform the sacrament of Homa and prayers prescribed for adoption," but he says that " this dictum is abundantly contradicted by Samiaca and others. And indeed the authorized practice of every day is a sufficient acknowledgment of the right and is in itself enough for the confutation of *Vachipati*." Further after quoting the

text of *Vashista* at p. 126, he says, "the ceremonies to be performed at the time of adoption are there described, and some rules are laid down respecting the age, &c., of the boy to be adopted, but these rules do not equally apply to all the castes, and they may be said to be general only and not indispensably applicable to any one caste." Then he quotes a case of a Kritima adoption under the law prevalent in Mithila decided by the Sudr Adawlut in 1795 in which no religious ceremony was observed, though (he says) "they ought according to legal strictness to have previously bathed." This was, he had been assured, a great relaxation of strictness in the doctrine which formerly prevailed by the authority of that school, but he suggests that the Courts in their efforts to get rid of superfluous forms, to remove mere ceremony out of the way of justice, ought to be consistent and guide themselves by the same liberal rules. With regard to the Rajah Nobkissen's case, Sir Francis, who was one of the Counsel for the adopted son mentions what it was considered necessary to prove in support of the adoption; and though the case was ultimately settled he says:—"I venture to say (and I am justified in saying so from what was declared by each Judge upon the bench) that Gopeemahen Deb was held bound to prove himself within the prescribed age, to prove that the initiatory ceremonies had not been performed in the family of his natural but in that of his adopting father and to prove not only 'a giving and receiving,' but that all the rites of adoption had been duly observed." The opinions of the Judges thus referred to could only have been given in the course of the hearing, and do not seem to have been quite satisfactory to Sir Francis himself, who in the next paragraph says that he should indeed have thought that the circumstances of that case might have exonerated the complainant from the proof of actual adoption and of its having been attended with all necessary formalities.

The authority of Sir Francis McNaghten cannot therefore, as it seems to us, be regarded as decidedly at variance with that of Sir Thomas Strange on the point which we have now to decide. Those two learned writers are decidedly at variance on the question whether there could be a valid adoption of an only son, but this Court in *Special Appeal* 412 *of* 1862 (1 *Madras High Court Reports* 54) and the Supreme Court of Bengal in *Sreemutty Jaurony Dossee* v. *Srimutty Sebasoondry Dossee* (*Fulton* 75) have upheld the opinion of Sir T. Strange on the ground that such an adoption, though blameable, when done is valid; *factum valet.*

Further, we may refer to the judgment of this Court in *Special Appeal* 38 *of* 1863 (1 *Madras High Court Reports* 368) in which it is incidentally observed that the customary rites and ceremonies connected with adoption would probably not be treated as necessary to its legal efficacy as regards the civil rights of the person adopted; and to the allusion made in the judgment of this Court in the Ramnad Case (vol. 2, page 234,) to "all essentials of a valid ceremony," but it is certain that on neither occasion did the Court intend to express any clear opinion, or in the last case any opinion at all, on the point now under consideration.

We were referred by Mr. Parthasarathy Ayengar to the late *Sudder Court Decisions of* 1852 at page 62, *Special Appeal* 74 *of* 1851, but that case only decides that a mere 'foster son' is not entitled to the privileges of an adopted son according to Hindu Law, and the passage quoted from *Nirnaya Sindhu* (of which we have been furnished with a translation) does not appear to us to add much weight to the authority of the *Datta Mimansa and Datta Chandrika*. The same text of *Vashista* already referred to is that on which the author relies; and so in the *Mitakshara* it is the text of *Vashista* which is quoted as the authority for the form of adoption, together with the more general passage from *Menu*:—"he is called a son given, whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress; confirming the gift with water. But these texts are in their language directory only, and the question is what part of the direction given is essential to the validity of the act?

We have not had the advantage of hearing this case argued on both sides; but, so far as we have been able to examine the authorities, the result in our judgment is that proof of the performance of the datta homam was not in this case essential to the establishment of a valid adoption, and that being the only ground of appeal, this special appeal must be dismissed and the judgment of the Lower Court affirmed.

Objects of adoption.—The primary *object* of adoption is of *a spiritual* nature; to save the soul of the ancestor from *Put*:(a)

(a) Atri. Dattaka Mimansa. S. I. 3.
Menu. do. 9 and 42.
Kalikapurana do. S. II. 45.
Dattaka Mimamsa. S. I. 41.
Do. Chandrika. S. I. 3.
Menu. Ch. IX. 138.
Vishnu. Sutras 44 to 46 I. W. and B. 341.

it carries the *temporal* benefit of inheritance; but that is of secondary concern, and an incident.(a) In the *Vasoreddy* case. 4 M. I. A. p. 1, the Court of original jurisdiction remark, "I come now to the last objection against the adoption. The right of adoption is a sacred one among the Hindoos; it is of a spiritual nature; and the Hindoo law is very pointed as to the reasons and object of adoption, and declares it to be for the sake of the performance of the funeral rites of a man having no male issue, and to perpetuate his name;(b) inheritance follows of course, but it is a secondary consideration." In *Huradhun Moockurjia* v. *M. Moockurjia and others* 4 M. I. A. p. 414. the Court said, "According to the religious tenets of the Hindoos, a man's state, after death—his deliverance from a place of suffering called *Put*, (the expression used in the translation of the documents before us, is "his salvation,") depends upon his leaving a son to perform certain rites and ceremonies after his death."(c) But a son cannot be the adopted to the great grandfather of the last taker after the lapse of several successive years, when, all the spiritual purposes of a son, according to the largest construction of them, should have been satisfied. *Bhoobum Moyee Debia* v. *Ram Kishore Acharj* 10. Moore's I. A. p. 279. Ib. 3. Suth. p. c. p. 15.

The necessity of a son is therefore apparent, and, in former times, when a man had no son, it was allowable to obtain for him a son through the vicarious assistance of a brother, or other near relative, specially appointed for that purpose.(d) It is unnecessary to pursue this matter further. It is strikingly analogous to the Hebrew custom of 'raising up seed;' but it is obsolete since the '*Kali*' age; and adoption, if not then instituted in its place, must at any rate have become far more general. By a legal fiction, a son, the *Kshatraya*, was thus obtained; but in the present day, the natural (*Aurosa*) son, and the adopted, (*Dattaca*)(e) and in some localities the *Kritrima*, or son bought,(f) are the only kinds of sons recognised by the law. In the *Ramnad case* 2. Mad. H. Ct. R. p. 206 the H. Court said, "In the administration of Hindu Law, we are, it seems to us, peculiarly bound to look at the reason of the law and the analogies derivable, not from other systems or modes of thought, but from such as we find in the system itself. In this respect we are only following the course

(a) Apastamba Dayabhaga. Ch. V. 6.
Vishnu. Sutra 40 I. W. and B. 340.
Dattaka Mimansa. S. I. 41.

(b) Menu. Dattaka Mimansa. S. I. 9.
Dattaka Chandrika. S. I. 3.

(c) Menu. Ch. IX. 138.
Harita. II. Dig. B. V. Ch. IV. S. XV. V. 303.
Vrihaspati. do. V. 304.
Vasishta. II. Dig. B. V. Ch. IV. S. XIV. V. 311.
Yajnyawalkya. do. V. 310.

(d) Menu. Ch. IX. 64 to 68 and 167.
Yajnyawalkya. II. Dig. B. V. Ch. IV. S. IV. 238.
Mitacshara. Ch. I. S. XI. 5.
Smriti Chandrika. Ch. X. 4.
Madhavya. 27.
Bondhayana. Sutra 12. I. W. and B. 316.
Vasishta. Sutra 11. I. W. and B. 331.

(e) Vrihaspati. II. Dig. B. V. Ch. IV. 279.
Adityapurana. do. 280.
Dattaka Mimansa. S. II. 64.
Do. Chandrika. S. II. 66.
Madhavya. 32.
Smriti Chandrika. Ch. IX. 6.

(f) Parasara Dattaka Mimansa S. II. 65.
Devaita Nirnaya of Vachastapati Misra. Stoke's H. L. 671.

observable in the administration of all systems of positive law. We are not at liberty as judges to manufacture principles of law anomalous because inconsistent with those of the system into which we seek to introduce them, but we are bound to apply to new cases or circumstances existing principles, and to push them to their natural because logically derivable conclusions. It may be, indeed, that the principle so to be applied is itself an anomaly, inconsistent with the general body of the law but too firmly fixed by judicial decision to be now disturbed. Where this is so a Court may properly refuse to push it any further, but only because the extension is forbidden by other principles with which the anomaly is in conflict. The authorities on Hindu Law lie before us as various strata before the geologist, widely differing in age although in close proximity. In the earliest of these writers, *Menu*, we find constant traces of doctrines in process of disappearance or already in conflict with those which were to take their place. We see the recognition of marriages between the various classes, always provided that the woman does not wed one of a class below her own, yet in conflict with this are passages which declare them to produce the deepest degradation. Menu himself wrote in the latter age and constantly implies that greater rigour of practice is necessary in an age of degeneracy.

"Taking together Slokas 64 to 68 of Cap. IX, it is plain that a practice had prevailed before the time of Menu for women of the twice-born classes to have children raised by a brother or other near relation commissioned for the purpose. *Menu* repudiates this practice, except in the case mentioned in Sloka 69, but considers that it is still permissible with Sudras. It is impossible to reconcile this prohibition with subsequent parts of the same Chapter without the assumption, of what seems to be the case, that although *Menu* referring to an older standard reprobated this raising of issue by commission, he was compelled to acknowledge that royal ordinance and example had legalized it. He was in fact upon this point a law reformer.

"The legal fiction of adoption was obviously not then of the importance which has since attached to it, and it is quite certain that in the days of *Menu* other modes of filiation were more common than this. It occupies a very subordinate place in *Menu*, and it is quite clear that there is no trace of the taking of the son by any other than him who affiliates. A distinction, moreover, seems to have existed between the son given, adopted and taken when abandoned. (S. L. 168, 169 and 171).

"It is from these meagre materials that the whole theory of adoption has been evolved. Menu merely states that eleven sorts of sons are permitted as substitutes for the son of the body for the sake of preventing the failure of obsequies. The reason given shows that they were capable of offering the funeral cake to the ancestral manes, and were therefore sons to all intents and purposes by the theory of Hindu Law.

"We still find in the *Mitacshara* an enumeration of various sorts of sons, and among them is (Kshetraja) the wife's son, who is defined "as the child begotten by another person, namely by a kinsman (Sapinda) or brother of the husband." And although throughout this Chapter certain preference is shown to the legitimate son of the bosom, yet the right of inheritance is thus summed up in section 33,—All without exception have a right of inheriting their father's estate for want of a preferable son. The same doctrine is enunciated by Nanda Pandita (sl. 1 cl. 33), following the passage of Menu, but in perusing both his work and that of Devanda Bhatta (Datta Mim. 64, Datta Chan. 9) we find the doctrine that none but the legitimate sons and the sons given can be taken to be sons. Thus the practices which Menu and Yajnavalkya, writing in the Káli age, recognised as existing, these writers subsequent in date have declared to be not permitted on account of the deficiency of power of men of the then present age compared with that of the holy sages; not perhaps a very satisfactory reason but curious for its similarity to the reason given by the reformers of all age. Affiliation, however, is regarded by these writers as at least as necessary as it was regarded by Menu, and we should therefore be prepared to expect, as in other systems of law, that a doctrine although in itself obsolete has fructified and produced visible consequences upon existent law. The son *primâ facie* is he who is born of a man and his wedded wife. A legal fiction enabled him to regard many other sorts of sons as his, and among them was son the raised up to him by his kinsman or brother. The doctrine of the adoption of a given son recognised the exercise of will in taking to himself the son given as equivalent to the actual procreation of a son. Then his wife was with his permission permitted to take a son who should be the son of both of them. If adoption however was to supply the void left by the disappearance of all the other modes of filiation, it must provide for the case of procreation of children by others. Now the brother of the husband or Sapinda was the person entitled so to procreate, and, looking at the analogies derivable from the ancient law, the opinions of those writers who have admitted the assent of a Sapinda have only drawn from the nature of the subject-matter a perfectly logical inference. They would naturally be led to that conclusion by what is rather loosely called the policy of the law, but what should perhaps rather be called a principle of law so generally pervading it as to furnish in doubtful cases a proper principle of interpretation."

And in the case of *Arundadi Ummal* v. *Kuppumall* 3 Mad. H. C. R. p. 283, the Court said, "It was, it would seem, at one period, the practice among Hindus, that on the death of a man without male issue one of his sapindas should (to use the Hebrew phrase) "raise up seed unto him," and the son thus begotten upon the widow was treated as the son of the deceased husband. When this and other similar practices (for it was not

only thus that a son might lawfully be procreated on behalf of a man) fell into disuse, the want of a son came to be supplied by the husband and wife concurring in the fiction of filiation by adoption.(a) This fiction was extended by allowing the widow to adopt under authority left her by her husband for that purpose,(b) and it was an obvious and justifiable extension of the fiction derived from the ancient practices, that the adoption by the widow should also be valid if made with the assent of her husband's sapindas."

A man may at any time change his mind before adoption, and desist from prosecuting his intention. *Daee* v. *Motee Nuttoo*, 1. Borr. p. 75. Ib. 1 Morl. Dig. p. 14. § 17.

What ceremonies necessary.— From the Leading Case it is clear that *giving and reciving*, testified to by some overt act, constitute the essential validity of adoption; that *no* ceremonies are indispensable; not even *Datta Homum* in a Bramin's family.(c) So in *Crastnarao Wassadewji* v. *Raghunath Harichandarji and another*. Perry, O. C. p. 150. The Court said, "We were inclined to think that even if other observances had been disregarded, still, the essence of the ceremony having been adhered to, the adoption was good for every legal purpose," according to the maxim of the civil law, prevailing, perhaps, in no code more than in that of the Hindus,—*factum valet, quod fieri non debuit*," (1 Str. 75). And see a very similar case to the present, which was decided at this Presidency, after much discussion, in 1826; *Bhasker Buchajee* v. *Narroo Ragoonath*, (1 Morley's Digest, 25). In addition to the Leading Case, and the cases referred to in it, consult on this point 2. Str. 63. *Kullean Singh* v. *Kirpa Singh and Bholee Singh*. 1. Beng. Sel. D. p. 9. *Alank Manjari* v. *Fakir Chund Sowker*. 5 Beng. Sel. D. p. 356. *Alwar Ammal* v. *Ramasamy Naicken* 2. Mad. Sel. Dec. p. 67. where it was held that at a Soodra adoption, neither the presence of the adoptive father's wives, nor of the boy's mother was necessary, nor that there should be any burnt offerings, nor drinking of saffron water by any but the adoptive father. Adoption is the act of the husband;(d) though the wife may join in it.(e) Her *consent* is not necessary.(f) *Vasooreddy case* 4 M. I. A. p. 1. *arguendo*. She, however, obtains spiritual benefit from the adoption: *Ib*: And the son becomes the son of both, and he performs the funeral rites to both.(g) So among the Sikhs, ceremonies, though usual, are not necessary, to make an adoption good. *Doe d Kishenchundershaw* v. *Baidam Beebee*. Sir H. East's N. of C. (case XIV) 2 Mor-

(a) Dattaka Mimansa. S. I. 18.
(b) Jagannada. II. Dig. 3d. p. 394.
(c) Menu. Ch. IX 168. 169. II. Dig. B. V. Ch. IV. S. VIII. V. 275.
Yajnyawalkya. do. V. 272.
Vasishta. do. V. 273.
Jagannada. II. Dig. 3d. pp. 391.
(d) Vasishta. II. Dig. 3d. B. V. Ch. IV. S. VIII. V. 273.
Jagannada. do. pp. 388 and 394.
Menu. Ch. V. 160.
Kalikapurana Dattaka Mimansa. S. II. 45.
Dattaka Chandrika. S. I. 7 and 24.
Dattaka Mimansa. S. I. 15.
(e) Vasishta and Satyashada. Dattaka Mimansa. S. I. 15 and 21.
(f) Dattaka Mimansa S. I. 22.
(g) Datta. II. Dig. B. V. Ch. VIII. S. I. V. 415.
Jagannada. II. Dig. 3d. 399.
Dattaka Mimansa. S. I. 22.

ley Dig. 22. In *S. Siddeny Dossee* v. *Doorgachurn Sett and others*. 1 Bourke. Rep. p. 360. *Phear* J. said, "With regard to the first issue, the only question which presents itself here is this; are the acts and ceremonies, which have been done and gone through which the view to constituting the lands of adopted sons of *Doyalchand*, sufficient for the purpose or not? Luckily I am not called upon in this case to make any subtle discriminations. Broad principles, easily deducible from the old writers, dictate the answer to the question. On referriug to Menu, I find him saying this:—"He whom his father, or mother with her husband's consent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water;" Ch. 9 sl. 168. Vasistha, cited by Jaganatha in his Digest, developes this, and says, (*see* Cole's Digest; Ch. 4 Section 8,) "He who means to adopt a son must assemble his kinsmen, give humble notice to the king, and then, having made an oblation to fire with words from the "Veda" (given by Menu in one of his earlier books), in the midst of his dwelling-house, he may receive, as his son by adoption a son," &c. I understand this passage to lay down that, to render the adoption complete, there must be a public act of *giving* and *receiving*, accompanied by the performance of some religious ceremony."

No writing is necessary.(a) See 2. Macn. 176. 2 Str. 89. But it is scarcely necessary to remark on the expediency of having so important an act evidenced by the most public and authentic means. In *Sootrugun Sutputty* v. *Sabitra Dye*. 2 Knapp 287. *Lord Wynford* in delivering the judgment of the Privy Council said, "The law of adoption owes its origin to the timorous superstition of the inhabitants of India. That people, vainly imagining that by leaving male children in this world they secured themselves against the torments of the next, seem to have been so anxious to obtain natural or adopted sons, that they have established but imperfect securities against fabricated adoptions. The having three children conferred advantages on Roman citizens which induced them to adopt sons; and when they had obtained the honours or the office which they desired, they often turned these adopted children loose on the world again. Tacitus, Annal. l. 15,c. 19, says: "Percrebuerat ea tempestate pravissimus mos, cum propinquis comitiis, aut sorte provinciarum, plerique orbi fictis adoptionibus adsciscerent filios, præturasque et provincias inter patres sortiti statim emitterent manu quos adoptaverant." The Romans, and those nations which have incorporated the civil with their municipal laws, have wisely, therefore, provided against such

(a) Menu. II. Dig. B. V. Ch. IV. S. VIII. V. 275.
Yajnyawalkya II. Dig. B. V. Ch. IV. S. VIII. V. 272.
Vasishta. II. Dig. B. V. Ch. IV. S. VIII. V. 273.

frauds. By the civil law the sanction of the magistrates was essential to the validity of the adoption of an infant, these magistrates being authorized to decide whether, regarding the circumstances of the person proposing to adopt, and those of the child that he was desirous of adopting, the adoption would be to the advantage of the latter. Dig. lib. 1, tit. 7, l. 17, s. 2. By the Code Napoleon, adoptions must be registered in the Court of the First Instance and in the Imperial Court, and in the latter an opportunity is afforded to the relations of the person proposing to adopt a child, of showing that the proposed adoption ought not to be allowed, this Court having authority either to confirm or annul any adoption. In our own country, although wills are revocable, we do not allow the favoured title of heir to be set aside but by a will in writing, attested in the presence of three witnesses. But according to the Hindoo law, neither registration of the act of adoption, nor any written evidence of that act having been completed, is essential to its validity. It is to be lamented, that an irrevocable act, which defeats the just expectations of the relations of deceased persons, may, at any distance of time after it is supposed to have been done, be proved by verbal testimony. It would certainly contribute much to the security of property and the happiness of Hindoo families, if, in a country where the religious obligation of an oath is unfortunately so little felt, and documents are so readily fabricated, adoptions and all other important acts were required to be perfected in the presence of some magistrate, and recorded in some court. But although neither written acknowledgments, nor the performance of any religious ceremonial, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when adoptions are to take place, in all families of distinction, as those of zemindars or opulent Brahmins, that wherever these have been omitted, it behoves this Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relations, unless the proof of adoption, by which that transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth." See the *Vasoореddy Case* 1. Mad. S. D. p. 520. See also *Srinarayan Mitter* v. *Srimati Krishna Sundari Dasi.* 2 Beng. L. R. c. a. j. p. 279, where it was held that execution of deeds, without giving and receiving, was insufficient.(a) See also *Siddesory Dossee* v. *Doorga Churn Sett.* 2. In. Jur. N. S. 22. In *Sabo Beeva and another* v. *Nahagun Maiti* 2 Beng. Law R. Append. p. 51. proof of the performance of ceremonies was dispensed with, where the adoption had been continu-

(a) Menu. II. Dig. B. V. Ch. IV. S. VIII. V. Yajnyawalkya II. Dig. B. V. Ch. IV. S. VIII. V. 272.
Vasishta. do. V. 273.

ously recognised for a series of years, and the party adopted had been in possession of the property in dispute, either personally or through his guardian.(a)

When the ceremony of *Oopanayana* has been performed on a boy, he cannot be adopted.(b) *P. Venkilasaya* v. *M. Vencata Charloo*. 3. Mad. H. Ct. R. p. 28. See 2. Str. 63. 86. 96. The age at which the *Oopanayana* should be performed is, with *Brahmins* eight, *Chastryias* eleven, and *Vysias* twelve.(c) In *Ranee Seevaganee Nauchiar* v. *S. Ragonado Saitooputty*: No. 18 of 1814. 1. Mad. Sel. D. p. 101. it was held as follows: "A child may be adopted from the twelfth day after his birth, to the day of Opanayanum, or tying on the *Poonnool*, or thread worn across the body. It is said in the Sastras, that the age for performing the Opanayanum is, for Brahmins eight years, for Cshatriyas eleven, for Vysyas twelve. Such are the rules respecting Brahmins, Cshatriyas and Vysyas." The ceremony of *Oopanayana* does not attach to *Soodras*.(d) It was so held in *S. K. Boochee Venkiah* v. *S. K. Chinna Appala Rauze*. R. A. 39. 40. 41 of 1857. Mad. S. R. for 1858. p. 83: though the cases are very badly reported and this fact does not there appear.

Where, in Bengal a suit, was sought to recover an estate from an adopted son on the ground that he was eight years old where adopted, whereas the adoption of a boy above the age of five was illegal, the adoption was declared valid: the initiatory ceremonies not having been performed in the natural family.(e) *Keratnarain* v. *Mt. Bhobinesree*. 1. Beng. Sel. D. p. 161. and see note (a) to p. 162. See acc. *Mt. Dullabh De* v. *Menu Bibi*. 5. Beng. Sel. D. p. 51. where it was further held, that tonsure in the natural father's house, *after* gift, did not vitiate the adoption.(f) *Quære* whether an adult can be adopted 2. Str. 85. and see *Verapermal Pillay* v. *Narrain Pillay* 1. Str. N. of C. p. 78. The age limit is not binding on Sudras. Ib.(g) The criteria of age are tonsure, and where that is not customary, the boring of the ears. See 2. Macn. p. 176. note. Ib. 181. F. Macn. 142. 196. 195.

Who may adopt and be adopted. —The *theory of* adoption is the complete change of paternity. In *M. Narammall* v. *Balaramasa Charloo* S. A. No. 139 of 1863. 1. Mad. H. Ct. p. 420 it is said, "The whole theory of an adoption is the complete change of paternity. For the purposes of this argument, the son is to be considered as one actually begotten by the adoptive father.(h) He is so in all respects, save an incapacity to contract marriage

(a) Jagannada. II. Dig. 3d. pp. 391.
(b) Vasishta. Dattaka Chandrika S. II. 23 and 29.
Kalikapurana. Vyavahara Mayuka. Ch. IV. S. V. 20.
(c) Menu. Ch. II. 36 to 39.
Yajnyawalkya. Note 31 Stoke's H. L. 544.
(d) Dattaka Chandrika S. II. 29.
Menu. Ch. X. 126.
(e) Kalikapurana. II. Dig. B. V. Ch. IV. S. I. V. 182 and 183.
Dattaka Mimansa. S. IV. 41.
Dattaka Chandrika II. 30 and 31.
(f) Kalikapurana II. Dig. B. V. Ch. IV. S. I. V. 182 and 183.
Jagannada. II. Dig. 3d. pp. 393.
(g) Menu. Ch. II. 36. and Ch. X. 126.
Dattaka. Mimansa. S. IV. 53.
Dattaka. Chandrika. S. II. 29.
(h) Menu. Ch. IX. 142. and 180.
Dattaka. Mimansa. S. I. 35.
Vrihaspathi. Dattaka Chandrika S. I. 8. and 9.

in the family from which he was taken.(a) It is not uninteresting to observe that the same theory of relationship in the adoptive family was adopted in the Roman law. Item amitam, licet adoptivam, ducere uxorem non licet." And in the case next noted, this same point was taken and allowed. To this incapacity may be added that of adopting a man's own natural brother. *Mootia Moodelly* v. *Uppen Vencata Chary* Sp. A. 27 of 1858. Mad. S. R. for 1858 p. 117.(b) There the Ct. said: "The plaintiff's title to the property in issue depends upon his adoption by Appun Pranatardhy Hara Charrier. This individual was the plaintiff's natural brother, but it is pleaded, that as he himself had been adopted out of the family, the bar of consanguinity to prevent his adopting the plaintiff had been removed. The pundits of the Sudder Udawlut were in attendance at the hearing of the suit, and were questioned as to the legality of the above adoption. The senior pundit gave it as his opinion that usage warranted the recognition of the adoption of one brother by another, and he pronounced in favor of such an adoption as that now in question. The junior pundit quoted authority (Duttaka Mimamsa of Nunda Pundita, v. 16) against the legality of the adoption of a brother, and furthermore stated, that pursuant to the rule that the person adopted should be one who might have been lawfully begotten by the adopter, and the analogy of the rule prevailing as regards marriage whereunder adoption does not remove the bar of consanguinity operating against intermarriage within the prohibited degrees, the circumstance that the person making adoption had himself been adopted out of the family would not place him at liberty to take his natural brother in adoption. The Court of Sudder Udawlut are satisfied that the junior pundit has given a sound exposition of the law affecting the case, and resolve in pursuance thereof to declare the adoption of the plaintiff invalid." And in *Moothoosawmy Naidoo* v. *Lutchmydawummah* R. A. 20 of 1851, Mad. S. R. for 1852, p. 96, the question was deliberated. There the Court observed; "The facts of the case having been so disposed of, it appears desirable, though not absolutely necessary, to advert to the important legal points mooted apparently for the first time, viz. the competency of a Hindoo, to be received or given in adoption by a brother. It appears to the Court of Sudder Udawlut that the Civil Judge had no grounds for the assumption made by him: of varying local practice, and that the opinion of the majority of the Pundits was correct, and ought to have been followed, as it appears to be in accordance with all the received Authorities on Hindoo Law, and although the Appellant's Pleader has quoted almost all these Authorities, he has failed to show any passage which warrants in any way, the conclusion, that a brother might receive,

(a) Menu. Ch. III. 5.
Dattaka. Chandrika. S. IV. 7. to. 9.
Prayogaparijata, Dattaka Mimansa. S. I. 31.
Vrhat. Menu. and goutama Dattaka Mimansa. S. VI. 10 and 11.
Vyavahara. Mayuka. Ch. IV. S. V. 29.

(b) Dattaka Mimansa. S. V. 17 and 20 and S. VI. 9. and 10. S. II. 30.

or give a brother in adoption. The only precedent quoted is the case of Veerapermal Pillay in the Recorder's Court at Madras, at Page 127 of Vol. I. of Notes of Madras Cases, in which case a boy was given by his elder half-brother: but the case was not analogous to this one, as the boy's mother was alive, and the opinion of the validity of the giving, was expressly stated to be founded on the presumed consent of the mother. To declare that an elder brother has the power to give his younger brother away in adoption, would be establishing a most dangerous precedent, which might obviously lead to much abuse, because such power, if it existed at all, must be inherent and absolute, and not one, the exercise of which might be sanctioned or annulled by the Courts, according to the view taken of its being beneficial or otherwise to the effect of it; and it fortunately does not appear, that the Hindoo Law sanctions any such power.(a) In a Bengal case quoted at Page 66, Vol. I. of Macnaghten's Hindu Law, the giving by a brother was declared invalid. In regard to adoption by a brother all the authorities seem very clear that a brother cannot be received in adoption by a brother, see especially Sir Thomas Strange, Vol. I., Page 71, and Macnaghten's Hindoo Law, Vol. I., Page 67." In *Ramanamall* v. *Suban Annavi* 2. M. H. Ct. R. p. 399. the same point was noted.

The criterion for ascertaining whether a particular individual can be adopted, is the competency of the adopting father to have married the natural mother of the boy whom it is proposed to adopt. For an adopted son is the "reflection of a son" Str. M. § 88.(b) In *Jivanee Bhayee* v. *Jiva Bhayee* R. A. 35 of 1865. 2. M. H. Ct. Rept. 462. the alleged adopted son was the son of a daughter of the adoptive father. The legality of such an adoption was challenged. It became unnecessary to decide the point; but the Court said, "On the point of the validity of the adoption of the son of a person with whom the adopter could not have intermarried, there will be found great conflict of opinion among the pundits, but none whatever upon the authorities. They are all perfectly consistent in declaring such adoptions invalid."(c) In *Runganaigum and another* v. *Namasevoya Pillay* S. p. A. 14 and *Catayee* v. *same Defendant*. S. A. 15 of 1857. Mad. S. R. for 1857, it is said that the prohibition relates to such blood-relationship as would have prevented the adopter marrying the adopted son's mother *in her maiden state*. The case was one of *Soodras*. The relationship of the adopted was that of wife's brother. The Court said, "The 5th Defendant's (4th Respondent) adoption has been found by both the lower Courts; the question at issue therefore is whether the Assistant Judge is

(a) Yajnyawalkya II. Dig. B. V. Ch. IV. S. VIII. V. 272.
Menu. do. V. 275.
Vasishta. do. V. 273.

(b) Caunaka. Dattaka Mimansa. S. V. 15.
Dattaka Mimansa. S. V. 16 and 20.
Dattaka Chandrika. S. II 8.

(c) Dattaka Mimansa. S. V. 17.
Do. Chandrika. S. I. 17.
Vyavahara Mayuka. Ch. IV. S. V. 9 and 10

correct in considering that a *Soodra* in the Southern parts of the Presidency cannot adopt his *wife's* brother. The grounds assigned by the Assistant Judge (Para 16) for his opinion are the passage in Strange's Hindoo Law, Vol. I, Page 71, "that one with whose mother the adopter could not legally have married must not be adopted." Consequently he argues that the same principle which prohibits the adoption of a brother because the adopter cannot marry his own mother would forbid the adoption of a brother-in-law, because the adopter is prohibited from espousing his wife's mother. But if Assistant Judge had read a little further he would have found that Sir Thomas Strange states that the son of a brother of the whole blood is the most proper object of adoption ;(a) thus clearly indicating that the prohibition refers to such blood-relationship between the adopter and the adopted son's mother as would have prohibited marriage with the latter in her *maiden state*; were it otherwise it would forbid the adoption of a brother's son on the ground that a man could not marry his sister-in-law, although the nephew (son of a brother) is universally admitted to be the most proper object of adoption. The above construction of the law is also supported by Paras. 96-97 of Strange's Manual, and is in accordance with that given by the District Moonsiff and senior Pundit.". So a Brahmin can adopt his brother-in-law ; because there existed no legal bar to marriage with the adopted son's mother in her maiden state.(b) In *Krishnyengar* v. *Vanamamalay Iyengar* Sp. A. 97. of 1856. Mad. S. R. for 1856. p. 213, the Court said "The Court of Sudder Udawlut observe that the Defendant's pleader has failed to show that the person adopted stood within the prohibited degrees to his adoptive father, nor does Sir Thomas Strange, in his exposition of the Hindu Law, determine the adoption of a brother-in-law to be invalid. The Court of Sudder Udawlut are of opinion, that as no legal bar existed to the marriage between the adopter and his adopted son's mother in her maiden state, the adoption of a brother-in-law is not opposed to the principles of Hindoo law." So in *Narasimalu* v. *Balarama Shaster* S. A. No. 139 of 1863. 1 Mad. H. Ct. R. p. 420 the Court said, "Now the passage quoted at page 101 distinctly forbids the adoption of a sister's son by one of the three higher classes,(c) and the weight of the prohibition is increased by the addition of the doctrine that the sister's son may be adopted by a Cudra.(d) Mr. Sutherland, the greatest English authority on the subject (P. 223,) lays it down as a fundamental principle that the person to be adopted must be one with the mother of whom the adopter could legally have intermarried."

(a) Menu. Ch. IX. 182.
Dattaka Mimansa. S. II. 67.
Dattaka Chandrica. S. I. 20. and 22.
Mitakshara Ch. I. S. XI. 35.

(b) Dattaka Mimansa S. V. 16 & 20.
Menu. II. Dig. B IV. Ch. IV. S. III. 185.

(c) Vridda Goutama. Dattaka Mimansa. S. II. 32.
Caunaka. Dattaka Mimansa. S. II. 74. and S. V. 16 and 17.
Cakalu Dattaka Mimansa. S. II. 107.
Dattaka Chandrika. S. I. 17.

(d) Caunaka Dattaka Mimansa. S. II. 74 and 93.
Dattaka Chandrika. S. I. 17.
Vyavahara Mayuka. Ch. IV. S. V. 9 & 11.

In *Morun Moeee Debia* v. *Bejoy Kishto Gossamee* 1. Cal. F. B. R. p. 121, where it was held that the adoption of a grand-nephew was legal,(a) this principle received additional illustration. There the Court said; "As regards the first point, the legality of the adoption of a grand nephew, we observe that the injunction in the Hindoo law is that a son should be adopted from among "Sapindas" or kinsmen extending to the seventh degree. A brother's son is indicated as the first Sapinda, and should, as a general rule, be selected for adoption in preference to all other individuals (Sutherland's Synopsis, page 214.). But the brother's grandson being one degree more distant, is by no means excluded as urged by appellant.

"It is contended that it would have been unlawful for respondent, the adopting father, to marry his nephew's wife, the mother of the adopted boy; and that, on the principle that it is not lawful to adopt one whom the adopter could not lawfully beget, respondent could not adopt his grand-nephew. The commentators, however, in illustrating this principle, point out that a man must not adopt his sister's son or daughter's son. In such cases the operation of the principle is obvious enough. But there is no reason whatever why the respondent should not have lawfully married his nephew's wife, the mother of the adopted boy, previous to her marriage with the boy's father."

A *Brahmin* cannot adopt his sister's son in Bengal. *Doe.* d. *Kora Shunko Takoor* v. *Beebee Munee*, Sir Hyde East's Notes of cases, 20. Ib. 1 Morl. Dig. p. 18 pl. 59: 2. Str. 79. and this law has been followed in the *Andra* or Telugu country in the Madras Presidency. *Narasamall* v. *Balasama Charlu* Sp. A. 139 of 1863. 1 M. H. C. R. p. 420. It may be questioned however, whether Chicacole is not within the *Dravida* Country. The evidence that it was *Andra* was that of a map 300 years old, and Mr. *Grady*, in his book on Hindu law, has drawn a line on his map so as to exclude it from the *Dravida* country, perhaps on the authority of this case: but the true line of demarcation for the *Dravida* country is by a line from Ganjam, *north* of *Chicacole*, to the Gulf of Cambay on the Western coast. See the *Ramnad Adoption* case 3. Mad. Jurist p. 300. where the Privy Council said,

"Their lordships entertain no doubt that the term "the peninsula," as used here, and other passages by the same author, denotes that part of India which is south of the line drawn from Ganjam to the Gulf of Cambay, and includes the whole of the Dravida district." Though this rather defines the "Peninsula."

But such an adoption among Soodras is good. 2. Str. p. 76.(b) None of the the three regenerate classes can adopt a sister's son.(c) F. Macn. p. 166. 1. W. and Bühl. p. 102. The adoption of a wife's

(a) Caunaka Dattaka Mimansa. S. V. 16 and 20.
Menu. II. Dig. B. IV. Ch. IV. S. III. V. 185.

(b) Caunaka Dattaka Mimansa. S. II. 74.
Dattaka Chandrika. S. I. 17.
Vyavahara Mayuka. Ch. IV S. V. 9 & 11.

(c) Vridda. Goutama Dattaka Mimansa. S. II. 32.
Caunaka Dattaka Mimansa S. II. 74 & 107.
Dattaka Chandrika. S. I. 17.

sister's son is valid, where brothers have each an only son. 2. Str. 82. See 2. Morley. Dig. p. 179.(a) In *Ramalinga Pillay* v. *Sadasiva Pillay*, 9 Moore's I. A. p. 506, the Court seems to have been under the idea that the case was one of an adoption of a sister's son in the *Visyas* or third class; whereas the parties were of the fourth class or *Soodras*. The error is in the *Placitum*. The case was decided on the facts. A sister's son cannot be adopted in the N. W. Provinces. 7. N. W. P. R. p. p. 441, 443. The ground assigned is that it would import incest. So a Brahmin widow cannot adopt her uncle's son, on similar grounds. *Dagumbaree Dabee* v. *Taramoney Daby Masa*. Macn. Cons. H. L. 168.(b) According to *Mithila* law, the adoption of a sister's son, even, by persons of high caste, according to *Kritrima* form of adoption, is valid. *Chowdree Purmessa Dutt Jha* v. *Hunoman Dutt Ray and others*, 6 S. D. A. R. 192. Ib. 1 M. Dig. 19. pl. 61.

In *Mithila* a brother cannot adopt a brother. *Baboo Runjeet Singh* v. *Baboo Obhya Narrain Singh*. 2. Beng. Sel. D. p. 245 and see note (a) to p. 246. In *Ooman Dutt* v. *Kunhia Singh*. 3. Beng. Sel. D. p. 145 (a Mithila case) it was held that while a brother's son exists, the adoption of any other is illegal.

Adoption, according to the *Kritrima* form, in *Mithila*, does not require the husband's authority or consent, *Mt. Shibo Koeree* v. *Joggun Singh*. 8. Sutherl. 155. *Choudry Purmessa Dut Jha* v. *Hunooman Dut Ray*. 6. Beng. S. D. R. p. 192. See *Mt. Sutpathe* v. *Indramund Jha*. 2. Beng. S. D. R. p. 173.(c) So also in *Tirhoot* 2 Macn. 196: and such an adoption is good after the *Oopanyana* has been performed. Ib. Certain forms are necessary. Ib. 198. 199. note. The agreement of both parties to the *Kritrima* form is essential. *Durgopal Singh* v. *Roopun Singh* and others. 6 Beng. S. D. R. p. 271.(d) But the son succeeds to the widow's own property only.(e) *Collector of Tirhut* v. *Nephews Hurroopershaud* 7. Sutherl. 500 and 8. Sutherl. 155. *supra*. The son adopted by a widow, with her husband's authority, has all the rights of a posthumous son. *Ranee Kishen Muma* v. *Rajah Oodwunt Singh* 3. Beng. S. D. R. p. 228. A sale therefore made by the widow, to his prejudice is invalid. Ib. In *Kullum Singh* v. *Kirpa Singh*. F. Macn. p. 126. a *Kritrima* adoption made by a man by verbal declaration, without religious ceremonies, was held valid in *Mithila*.(f) In *Tirhut*, the adoption of any other boy, while a brother's son is living, is invalid, whether in the *Kritrima* or *Dattaka* form; *Ooman Dut* v. *Kunhia Singh*. 3. Beng. S. D. p. 144.(g)

In *Behar*, a boy adopted according to the *Kritrima* form, succeeds

(a) Dattaka Mimansa. S. V. 16 and 20. Menu. II. Dig. B. IV. Ch. IV. S. III. V. 185. Dattaka Chandrika. S. 1. 29.

(b) Dattaka Mimansa. S. V. 16 and 20. Menu. II. Dig. B. IV. Ch. IV. S. III. V. 185.

(c) Dewaita Nirnaya of Vachaspathi Misra. Note V. Stoke's H. L. 671.

(d) Rudradhara in the Cuddhi Viveka. Note to Mit. Ch. 1. S. XI. 17. Boudhayana. Sutra 14. I. W. and B. 316.

(e) Note V. Stoke's H. L. 672.

(f) Rudradhara in the Cuddhi Viveka. Note Mit. Ch. I. S. XI. 17. Note XVI. Stoke's H. L. 670.

(g) Mitacshara. Ch. I. S. XI. 30.

to the inheritance, both in his own and his adoptive family *Mt. Deepoo* v. *Goureeshunker*. 3. Beng. Sel. D. p. 307.(a) The son of a brother may be adopted in the *Kritrima* form 2. Macn. 197. even though an only son. Ib. The adoption of the only son of an elder brother, in preference to that of the younger son of a paternal cousin is invalid, though sinful. *Arnachellum Pillay* v. *Iyasawmy Pillay* 1. Mad. Sel. D. p. 154.(b)

In *Permal Naick and another* v. *Pothee Umall and others*. R. A. XI. of 1849, Mad. S. R. for 1851, p. 234, a case remarkable for the disagreement of the Pundits with themselves and with each other, the Court says; "The opinions of the pundit clearly show that as a general rule the adoption of an eldest, or of an only son, is an act alien to the principles of Hindoo law. The reason of this is obvious, that the eldest son is the stated person upon whom the father should depend for the performance of those obsequial rites to which the Hindoos attach such importance. It appears, however, according to the Senior Pundit, and the authorities he has cited, that an adoption of an eldest, or of an only son, by a paternal uncle, but by none other, is sustainable; and Sir Thomas Strange (volume I, page 87) has given it as his belief that "with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are *directory* only, and an adoption of either, however blameable in the giver, would nevertheless, to every legal purpose, be good, according to the maxim of the Civil Law, prevailing perhaps in no code more than in that of the Hindoos, *factum valet quod fieri non debuit.*" See acc: *Sivapoorya Pillay* v. *Nagalinga Pillay* Sp. A. 51 of 1858 Mad. S. R. for 1858 p. 90. It appears that such an adoption, if made by a paternal uncle, is good. *Rajah Shumsheer Mull* v. *Ranee Dilraj Konwur*. 2. Beng. Sel. D. p. 169. The effect of such an adoption is to make the adopted *Dwyamushana*, or son to both: and he inherits under his adoptive parent without losing his inheritance from his natural father (Ib.) See also *Abasse Dinkur* v. *Gungadhur Wadoo Gosayee*, 3. Morr. Bomb. S. D. A. R. p. 420. 423. 2. Str. 83. 93. 1. Mac. H. L. p. 71.

In *Arnachellum Pillay* v. *Iyasawmy Pillay*, No. 5 of 1817. 1. Mad. Sel. D. p. 154, the Pundits said, "It is not lawful for a man to give his only son, in adoption to another. It was not lawful for a man to receive, in adoption, the only son of another. Therefore, it is not lawful, and consequently not incumbent, on a man to adopt the only son of his elder brother, in preference to youngest son of his paternal Uncle. But if such an adoption, as aforesaid, should take place, although the giver and the receiver, in adoption, have thereby committed sin, the adoption is valid." Whereupon the case was so decided; in conformity with the principle *factum valet* &c. And in *Chuma Gounden* v. *Kumara Gounden* S. p. A. 412 of 1862. 1. Mad. H.

(a) Suth. Note XV, Stoke's H. L. 676.
(b) Dattaka Mimansa. S. II, 38. Dattaka Chandrika. S, I. 28.

Ct. R. 54, it was again expressly held, that the adoption of an only son is, when made, valid according to Hindu Law. There, the whole law was considered, and the reasoning of Mr. Justice *Strange* in his *Manual*, p. 94 dissented from. (But see 2. Macn. p. 178. 179. 182. 192. 195.) This is the Leading case in the Madras Presidency on this particular subject. There the Court said, "This is a short point on which we may clearly come to a conclusion. Two questions are raised—first, did this adoption in point of fact take place?—secondly, if so, was it valid in point of law? It is admitted that the first question must be answered in the affirmative. Then as to the second, the only authority produced is a passage from Mr. Justice Strange's *Manual of Hindu Law*. Everything found in that book is undoubtedly deserving of much respect; but it must be observed that the passage in question is not supported by any cited authority. And on perusing it attentively it is, I think, clear that the learned author must have been dealing with religious considerations strictly; and that when he says the adoption of an only son is, 'void,' he means void from the orthodox theological point of view of the çâstras and commentaries, and as being likely in Hindû belief to entail painful consequences in *Put*. But we are here to decide on temporal rights, not to consider such spiritual liabilities; and the application of the maxim *factum valet* to such a point as the present is wise, I think, and justified by many authorities which quite preclude our giving effect to the conclusion stated in Mr. Justice Strange's Manual.

"The result of all the authorities," says Sir Thomas Strange, (c) "is that the selection is finally a matter of conscience and discretion with the adopter; not of absolute prescription, rendering invalid an adoption of one, not being precisely him who on spiritual considerations ought to have been preferred." And again: "with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply they are *directory* only; and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good; according to the maxim of the civil law, prevailing, perhaps, in no code more than in that of the Hindus, *factum valet, quod fieri non debuit*" (a). Then there is the case of *Veerapermal Pillay* v. *Narrain Pillay*, with those of the *Rajah of Tanjore*, *Arunachalam Pillai* v. *Ayyasami Pillai*, *Nundram* v. *Kashee Pande* (b), *Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondry Dossee*, all of which are noted in the first volume of Morley's Digest, p. 17, and all of which support Sir Thomas Strange's doctrine.

"Referring to Mr. Justice Strange's argument, I may observe that it rests on the assumption that it is the birth or adoption of the son that delivers the natural or adoptive father from the danger of *Put*. But surely this is erroneous. It is the son's performance of his father's exequial rites, not his birth or adoption, that relieves the father from the danger in question. Would the father, after the birth or adop-

tion of a son, be considered safe from *Put* if those rites were not performed owing to the son's death, his loss of caste, or for any other reason? If the mere birth of a son were all that was required, it would hardly be laid down, as it is (c), that on the death of such son the affiliation of another is indispensable. Adoption takes place according to Atri "for the sake of the funeral cake, water and solemn rites," and according to Menu for these objects and also for the celebrity of the adoptive father's name. But not for the sake of the supposed efficacy of the mere act of adoption. If, then, the saving virtue lies solely in the performance of the exequial rites, Mr. Justice Strange's doctrine of the total expenditure on the natural father of the efficacy of his son's birth, does not seem to warrant his conclusion. The adopted son may well perform his adoptive father's rites, and in certain cases it appears, when he is a *dvyamushyâyâna*, those of his natural father also. It cannot, then, be said that the adoption "fails in its essential use," and is for this cause void. I may remark that the hostility shewn in the çástras to the adoption of an only son arose, probably, from other than mere religious considerations. The true reason, perhaps, is furnished by Jagannátha who lays down the law thus: "Let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct;" but this, he goes on to say, "does not invalidate the adoption of such a son actually given to him.

"On the whole, the case is concluded by authority; but I must say, with all possible respect for Mr. Justice Strange, that upon principle and reason I should have felt myself bound to decide the point in the same way." It is unnecessary to encumber the text with citing the *cases* referred to, in the judgment. The following cases may be consulted. The *Rajah of Tanjore's Case*, cited *in Verapermall Pillay* v. *Narrain Pillay* 1. Str. N. of C. p. 91. *Rajah Shumsheremull* v. *Ranee Dilraj Konwar* 2. Beng. Sel. D. p. 169. *Arnachellum Pillay* v. *Iyasawmy Pillay*. 1. Mad. Sel. D. p. 154. *Nundram* v. *Kashee Pandee*. 3. Beng. Sel. D. p. 232. *Debie Dial* v. *Hur Hor Singh* 4. Beng. Sel. D. p. 320. *S. Taymoonee Dossee* v. *S. Sibosoondry Dossee*. 1. Full p. 75.

So stands the law on this point in this Pesidency. In Bengal a directly opposite decision hasvery recently been pronounced.(a) In *Rajah Upendra Lal Roy* v. *Srimati Rani Prasaunamay R. A.* 75 of 1868. I. Beng. Law R. c. a. j. p. 221, the Court held that the adoption of an only son is invalid. The Madras Case *Chinna Gounden* v. *Kumara Gounden* was cited, among others; so that we have here a direct conflict of authority. The judgment of the Court was delivered by Mr. Justice *Mitter*, who said: "It appears that the plaintiff was the only son of his natural father, and as the adoption of an only son is contrary to the Hindu

(a) Vasishta II. Dig. B. V. Ch. IV S. VIII. V. 273.
Dattaka Mimansa. S. II. 38. S. IV. 1. & 6.
Dattaka Chandricka S. I. 28 and 29.
Mitacshara Ch. I. S. XI. 11.
Vyavahara Mayúka Ch. IV. S. V. 9.
Apasthamba. Sutra 11. and Haridatta's comment thereon I. W. and B. 306.

law, the title set up by the plaintiff must necessarily fail. That the adoption of an only son is contrary to the Hindu Law, the title set up by the plaintiff must necessarily fail. That the adoption of an only son is prohibited by the Hindu Shastras, is beyond all controversy. The two leading authorities on the subject, namely the Dattaka Mimansa and the Dattaka Chandrika, are unanimous in declaring that such an adoption should never be made :—

"By no man having an only son *(eka-putra)*, is the gift of a son to be ever made" (1).

He who has an only son, or one having an only son, the gift of that son must never be made. For as Vasishtha declares, "an only son let no man give." Therefore, a prohibition against acceptance is established by the text in question. Accordingly Vasishtha says, "let no man give or accept, &c." (2).

"To this he subjoins a reason. 'For he is destined to continue the line of his ancestors.' His being intended for lineage being thus ordained : in the gift of an only son, the offence of extinction of lineage is implied. Now, this is incurred by the giver, and the receiver also."

"By no man having an only son, is the gift of a son ever to be made."

"The passages cited above are sufficient to show that the adoption of an only son is forbidden by the Hindu law. It has been said, that the prohibition contained in these passages amounts to nothing more than a mere religious injunction, and that the violation of such an injunction cannot invalidate the adoption, after it has once taken place. We are of opinion that this contention is not sound. It is to be remembered that the institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion ; and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable. "By a man destitute of male issue only," says Menu "must the substitute for a son of some one description always be anxiously adopted, for the sake of the funeral cake, water, and solemn rites." It is clear, therefore, that the subject of adoption is inseparable from the Hindu religion itself, and all distinction between religious and legal injunctions must be necessarily inapplicable to it. Suppose, for instance, that a son has been adopted by a childless widow without the permission of her husband, the prohibition against such an adoption is contained in the following passage :

"Let not a woman either give or receive a son in adoption, unless with the assent of her husband" Can it be said that such an adoption would be valid in law ? It will be observed that the language employed in the preceding text is precisely similar to that employed in the text prohibiting the adoption of an only son ; and it would be difficult to suggest a reason why an adoption invalidated in the one case for temporal purposes, upon considerations arising out of the religious view of the matter, should not be

equally invalidated in the other case upon similar grounds. One of the essential requisites of a valid adoption is that the gift should be made by a competent person, and the Hindu law distinctly says that the father of an only son has no such absolute dominion over that son as to make him the subject of a sale or gift. Such a gift, therefore, would be as much invalid as a gift made by the mother of the child, without the consent of the father. It is to be borne in mind that the prohibition in question is applicable to the giver as well as to the receiver, and both parties are threatened with the offence of "extinction of lineage," in case of violation. Now the perpetuation of lineage is the chief object of adoption under the Hindu law; and if the adoptive father incurs the offence of "extinction of lineage," by adopting a child who is the only son of his father, the object of the adoption necessarily fails. It is true that the doctrine of *factum valet* is to a certain extent recognised by the lawyers of the Bengal School; but if we were to extend the application of this doctrine to the law of adoption, every adoption, when it has once taken place, will be, as matter of course, good and valid, however grossly the injunctions of the Hindu Shastras might have been violated by the parties concerned in it. The case of *Chinna Gaundan* v. *Kumara Gaundan*, is no doubt in favour of the appellant, but for the reason stated above, we are unable to concur with the learned Judges who decided that case. On the other hand we find two cases in our Presidency which are directly in favour of the view we have taken, and what is of still greater importance, both these cases have been cited with approbation by Sir William Macnaghten himself. The first case is reported in page 178, volume 2, of his work on the Hindu law, and the second is to be found in page 179 of the same volume. We may also observe that the learned translator of the Dattaka Chandrika and the Dattaka Mimansa is of the same opinion.

"For the foregoing reason, we are of opinion that the plaintiff's suit must be dismissed, but without costs."

Should the point ever come under review by the Privy Council, the Bengal ruling will probably be found the sounder. Meanwhile, although it is unfortunate to see the highest Courts of sister Presidencies in direct conflict with each other on a point, as to which the difference of opinion is not to be attributed to the difference of authorities which are of the highest estimate in the several schools of Bengal and Benares, but to different deductions from authorities common to both; yet it does not so much matter what the law is, as that it should be settled; which, for the purposes of the several Presidencies, it practically is, by the decisions of their respective Courts.

The reasons against giving an only son in adoption are equally strong against giving an eldest son; and this means the eldest living at the time, though not first born. 2. Macn. p. 195. 2. Str. 81.(a) The eldest of several sons by a second

(a) Mitacshara Ch. I, S. XI, 12. Manu. Ch. IX. 106. 107.

wife may be given, if there be a son by an elder wife. *Verapermall Pillay* v. *Narrain Pillay*. 1. Str. n. of l. p. 100. Where a second son was given, but his elder brother died before the adoption was complete, it was held that the adoption might be proceeded with notwithstanding the death of the elder rendered the second the eldest son, and as such the proper person to perform his own natural father's funeral ceremonies. *Mt. Dallabh De.* v. *Menu Bibi* 5. Benl. Sel. D. p. 51.

An adoption made after the adopted son is married, is clearly invalid.(a) *C. C. P. Vencatachella Reddyar* v. *C. C. M. Vencatachella Reddyar* No. 7 of 1823. 1 Mad. Sel. D. p. 406 and see *Virakumara Sawai* v. *Gopaul* Sp. A. 3 of 1861 Mad. S. R. for 1861 p. 147. See also the same law laid down in *Ranee Sevagany Nachiar* v. *Streemathoo Heraniah Gurbah* No. 18 of 1814 Mad. Sel. D. p. 101. 2. Str. p. 63.

But in *Sree B. Maharaj* v. *Sree G. Maharaj*. 1 Borr. p. 201, where the adopted son was married, and 45 years old, and had a family, and was solemnly prohibited by his own father from being adopted, the Pundits nevertheless replied: "It is also stated that a boy under five years of age should be adopted in order that he may be brought up in the religious tenets of his adoptive father. This relates to cases where no relationship subsists, but when a relation is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family, provided he possess common ability, and is beloved by the person who adopts him." 1. Borr. 196. 181 Morley's Digest 17. § 16.(b)

An adoption by a Leper is invalid (except as to his own property); for by his leprosy, he forfeits his right to maintenance, and therefore cannot transmit it. See 2. Macn. p. 201: unless he has performed the prescribed penance. Ib. 202. *et ibi notam.* In *Seeva Chilumbra Pillay* v. *Parasuity*, it was held that Sp. A. 133 of 1857; Mad. S. R. p. 210.(c) the excluding cause, if not arising from natural defect, must have arisen previous to the division of the property; as if it do not occur till afterwards, the succession is not divested by it. (1 Sir T. Strange Hind L. p. 163.)(d)

According to the *Maramookatayem* and *Alya Sultana* Law prevailing in Malabar and Canara, respectively, where the inheritance runs in the *female* line, on the failure of the sister's progeny, male and female, the head of the family may make an adoption. *Cotay Hejaday* v. *Manjoo Kumpty* Sp. A. 74 of 1859 Mad. S. R. for 1859. p. 138. There the Court said; "The first defendant is brother of the first plaintiff's mother, the latter being the head of the family by whom the adoption was made. His existence therefore could not bar the adoption. The Court notice, however, that the adoption was effectively barred by the fact of the first plaintiff's existence, he being son of the party making the adoption, and she being thus not without pro-

(a) Dattaka Chandrika. S. II. 29.
(b) Vyavahara Mayuka Ch. IV. S. V. 19.
(c) Mitacshara Ch. II. S. X. 11. Dattaka Chandrika. S. VI. 1.
(d) Mitacshara. Ch. II. S. X. 6.

geny, and therefore not in position to make an adoption. The adopted must be a female. Str. Man. § 391. See note to Sp. A. 83 of 1862. *Munda Chitty* v. *Timmajee Hensee.* 1 Mad. H. Ct. R. p. 381. *Anon.* 1. Mad. Sel. D. p. 157.

An adoption by a widower is valid. *Nagapah Redapah* v. *Subba Chastry* 2. Mad. H. Ct. 367 (over-ruling Str. M. § 61.) There the Court said: "The only question before us is whether this adoption must be held to be invalid on the ground that Kristna Sastry was at the time a widower. On this point we observe that the opinion which the Principal Sadr Amin has formed with reference to the subject appears to be founded chiefly, if not entirely, on a passage in *Mr. Justice Strange's Manual of Hindu Law, Section* 64, in which he quotes as his authority the *Datta Kimansa* of Somanath. We cannot find, however, that this latter work has been regarded at any time as of much weight on points of Hindu law, nor is it specified by Mr. Justice Strange himself among the authorities, of which a list is given at the commencement of his *Manual.* On the other hand the views expressed on this point *by Sir Thomas Strange,* Vol. I, page 65, Ed. 1825; *by Sir W. H. Macnaghten,* Chapter VI, "*Of adoption,*" page 66; by *Colebrooke* in his *Digest,* Vol. 111, page 252; and by *Sutherland in his Treatise on the Law of Adoption, Appendix* Note 1V, are all opposed to that now enunciated by the Principal Sadr Amin, and are in favor of the validity of an adoption made by a Widower.

"We think, therefore, that the pleader for the plaintiff has failed to make out his case, or to show that an adoption by a widower, as in this instance, present any exception to the general rule of Hindu Law, which allows the privilege of making such adoption to one destitute of legitimate male issue."(a)

Adoption by a widow, while a *minor* is good, *ex necessitate rei.* 2. Macn. p. 180.

In the case of an adoption by a minor under the Court of Wards, under Bengal Regulation X of 1793, without the consent of the Court of Wards, it is questionable whether the act is wholly void. *M. Anundmoyee* v. *Sheeb Chunder Roy and others* 9 M. I. A. p. 287. The same holds good of the law under the Court of Wards Regulation of Madras IV. (of 1804 S. 25, and the coresponding Bombay Regulation.

An unnmarried man can adopt. 2. Macn. 175. and in *Gunnapa Deshpandee* v. *Sunkapa Deshpandee.* 1 Morl. Dig. p. 16. § 35. it was held that the right of a *Bramachan,* or Bachelor, to adopt rested on local custom.(b) The widow of a dumb or madman may adopt 1. W. and Bühl. 288.

A dancing girl may adopt; but only a daughter. *M. Chellakonda Alasam* v. *C. Ratnachellum and others* 2 Mad. H. Ct. R. p. 56. It was not denied that § 98,99 of Strange's Manual correctly laid down the Law. An adoption, during the life of the natural son (1 W. and Bühl. p. 102) or

(a) Dattaka Mimansa. S. I. 3. 4. 6. 9. 13. Jagannatha. II. Dig. 3d. 396.
(b) Dattaka Mimansa. S. I. 4. Dattaka Chandrika. S. I. 4. Jagannatha. II. Dig 3d. 394.

(1. Morl Dig. p. 14 note 3) of the first adopted son, is invalid. 2 Str. 61.(a) So in *Sudanund Mohapatter* v. *Bonomalla and others*. 1. Marshall. p. 317, this was expressly affirmed. And See. *M. Day* v. *O. Day. and another*. 1. Bourke p. 189. See also. *S. Sidesooby Dossee* v. *Doorgachurn Sett and others* Ib. p. 360.

In *Suddanund Mohapatter* v. *Musmut Soojmoonee Dabee* 5. Wyman c.r. p. 5, (which was a suit arising out of the suit referred to above in Marshall p. 317) the Court again held the second adoption wholly inoperative as against the rights of the first adopted son. In the great *Vasoreddy case*, (which is the Leading case upon this point, 4 M. I. A. p. reversing No. 1. of 1827. 1 Mad. S. D. p. 524) the whole of the cases were reviewed. See p. 93-102. Nor will the subsequent death of the first adopted make such a second adoption good. *Basoo Camummah* v. *Basoo C. Vencatasa*. Sp. A. 142 of 1855 Mad. S. R. for 1856 p. 20; and see *Veraprashyia* v. *Santauraja*. Sp. A. 134 of 1860. Mad. S. R. for 1860 p. 168. But a second adoption, *after* the death of the first adopted son without male issue, is good. The Vasoreddy Case 1. Mad. Sel. D. p. 520. s. c. 4. Moore's I. A. p. 1. *Shamchunder* v. *Narayna Debeh*. 1 Beng. S. D. R. 209, (recognised in the *Vasoreddy* case, page 98.)(b) The curious case of *Goorupershaud Rai* v. *Mussummut Jymala* 2 Ben. S. D. Rep. p. 136, which seems to assume the validity of a double adoption, (as to which See 1. W. and Bühl. p. 42. 2 Macn. 181. 2 Str. 61) was questioned by the Privy Council in the same case.

Authority may be given to a widow to adopt, *conditionally* on the death of an adopted, or natural son. *Shamchunder and another* v. *Narainah Dibehi*. 1 Ben. S. D. p. 209 s. c. 1 Morl. Dig: p. 14. §. 13 (as to which however, see remarks of the Privy Council in *Vasoreddy case* 4 M. I. A. 1.) and see the same point. *Sreemutty Dosse* v. *Tarachum Coondoo Chowry*. 1. Bourke c. a. p. 48. where it was also held that a widow is not *obliged* to adopt a second son on *the death of the first* under a power given her by her husband; and if she does not, she becomes herself the heir to the adopted son, though she may be morally wrong in it. In that case it appeared that the husband had not given a conditional power, for a second adoption; and the Court questioned whether a second adoption would have been valid, if made, See also *Solukhna* v. *Ramdulol Pandee*. F. Macn. p. 157. *Shamchunder* v. *Narayni Dabee* 177. An authority to a widow to adopt conditionally on death of natural or adopted son is good; but not, that she is to adopt in event of disagreement with existing son. *Solukna* v. *Ramdulol Pandee* S. F. Macn. p. 184.(c)

It seems that when the first adoption fails by the death of the

(a) Atri Dattaka Mimansa. S. I. 3. 10.
Caunaka. S. I. 4 and 6.
Menu. Dattaka Mimansa. S I. 9. and 13.
Dattaka Chandrika. S I. 5. and 6.

(b) Dattaka Mimansa. S. I. 4.
Dattaka Chandrika. S. I. 5.

(c) Vasishta. II. Dig. B. V. Ch. IV. S. VIII. 273.
Dattaka Mimansa. S. I. 3, 4. 6. 9. 13. and 18.
Dattaka Chandrika. S. I. 5 and 6.

adopted son, cases are not wanting in which the widow by virtue of her *general* power to adopt, may supply the void by adopting a *second* son. (See 1 Morl: Dig: p. 14. Note 3.) There is, however, a very important case recently decided by the Privy Council on this point: *M. B. Moyee Debia* v. *Ram Kishore A Chowdhry and Chundrabullee Debia*. 10 M. I. A. 279. s. c. 3. Suthl. p. c. p. 15. There, A, who had a natural son, executed an instrument empowering his wife to adopt, in event of his natural son's decease; and in event of such adopted son's decease, to adopt others, *toties quoties*. The natural son survived his father, succeeded, attained full age, married, and died childless; leaving B his widow, C his adoptive mother. Thereupon, in pursuance of her husband's power, C. adopted D. It was held that this adoption was invalid: inasmuch as it would operate to divest the inheritance, which by the death of B's husband had passed to his widow. The power was expressed to be to secure *succession to the Zemindary*, and also to *avoid the extinction of the Pinda*; *and for the performance, of the shrad, and other rites of A and B, and for the sheba of the Gods*. Here, notwithstanding the primary *religious* object of the institution of adoption, the consideration of the *temporal* rights was held to defeat the adoption. The Privy Council Judgment says,

"How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the posibility of more than one adoption; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limits must be assigned. It might well have been that *Bhowanee* had left a son, natural-born or adopted, and that such son had died himself, leaving a son, and that such son had attained his majority in the life-time of *Chundrabullee Debia*. it could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great-grandfather of the last taker, when all the spiritual purpose of a son, according to the largest construction of them, would have been satisfied.

"But whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that if *Bhowanee Kishore* had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to *Chundrabullee Kishore* would have been at an end.

"But it is difficult to see what reason could be assigned for such a result which would not equally apply to the case before us.

"In this case, *Bhowanee Kishore* had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father. He had succeeded to the ancestral

property as heir; he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property.

"On the death of *Bhowanee Kishore*, his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers, if he had had any. She took a vested estate, as his widow, in the whole of his property. It would be singular if a brother of *Bhowanee Kishore*, made such by adoption, could take from his widow the whole of his property, when a natural-born brother could have taken no part. If *Ram Kishore* is to take any of the ancestral property, he must take all he takes by substitution for the natural-born son, and not jointly with him.

"Whether under his testamentary power of disposition *Gour Kishore* could have restricted the interest of *Bhowanee Kishore* in his estate to a life-interest, or could have limited it over (if his son left no issue male, or such issue male failed) to an adopted son of his own, it is not necessary to consider; it is sufficient to say that he has neither done nor attempted to do this. The question is, whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of *Gour Kishore* would not have taken.

"This seems contrary to all reason and to all the principles of Hindoo law, as far as we can collect them.

"It must be recollected that the adopted son, as such, takes by inheritance and not by devise. Now, the rule of Hindoo law is, that in the case of inheritance, the person to succeed must be the heir of the last full owner. In this case, *Bhowanee Kishore* was the last full owner, and his wife succeeds, as his heir, to a widow's estate. On her death, the person to succeed will again be the heir at that time of *Bhowanee Kishore*.

"If *Bhowanee Kishore* had died unmarried, his mother, *Chundrabullee Dibia*, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercisng the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the Text-books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested.

"The only case referred to in the argument before us, or in the judgment below, as tending in that direction, is that of *Luckinarain Tagori*, reported by Sir F. *Macnaghten*, "Cons. on Hindu Law," p. 168; but it is incontestable that in that case the disposition depended wholly on the testamentary power. The

authority to adopt was only subsidiary to the disposition of the property. The will of *Luckinarain Tagori* is set forth in full in No. 5, p. 9, of the Appendix to Sir F. *Macnaghten's* work. It is termed a Will; it appoints an Executor; it disposes of the whole estate; gives various legacies; gives the residue to the child of which his youngest wife was pregnant, whether a son or a daughter, in which latter case it would obviously break the legal order of succession; and directs that at that child's death the adoption of a son shall take place. We have already said that we express no opinion as to the power of *Gour Kishore* to have made the disposition now insisted on by the Appellant by devise of his estates, but we find no such devise in the instrument which he has executed.

"An additional difficulty in holding the estate of the widow of *Bhowanee Kishore* to be divested may, perhaps, be found in the doctrine of Hindoo law, that the husband and wife are one, and that as long as the wife survives, one-half of the husband survives; but it is not necessary to press this objection."

The decision in this case does not, however, militate against the general proposition that a man may give an authority to his widow to adopt conditionally on the decease of his natural or then adopted son. The power was held invalid and incapable of execution as against the widow of the adopted son, whose estate would have been divested, had a second adoption taken place. Had the adopted son died without a widow and issueless, I conceive that the power was well enough.

Where there are two widows, if so authorized, they may adopt in succession. *Shamchunder* v. *Narayni Dabee*. Sir F. Macn. 156. *Gourupershaud Rai* v. *Jymala* Ib. 181.(a) But where the husband adopts himself, after conferring the power on his widow, it tolls the widow's power, nothing appearing to the contrary Ib. p. 81.(b)

A simultaneous adoption of three boys, cannot be upheld; see *Senkel Sevan* v. *Aralunda Ambalaharan* Sp. A. 264 of 1861. Mad. S. R. for 1862. p. 27.(c) *Sed quære*, whether the adoption of the *eldest* might not take effect, rather than leave the adopter without any representative? An authority given by a man to his widow to adopt, a son in event of her disagreeing with his son then alive, is invalid. *Mt. Solukona* v. *Ramdolat Pandee and others*.(d) 1. Beng. S. D. R. p. 326. Nor can a widow, though she has authority, adopt while a son is living. 2. Macn. p. 200. *et ibi notam*.(e) But an authority to adopt again, contingent on the death of son or adopted son is good. 1. Beng. S. D. R. p. 326. *supra*. But where the giving and receiving preceded the death of elder son, the adoption was held valid. *Mt. Dullarbh De.* v. *Manu Bibi*. 5. Beng. S. D. R. p. 51.

The texts of Hindu Law which

(a) Vanista. II. Dig. B. V. Ch. IV. S. VIII. 273.
Also Vide P. P. 62 (b)—
(b) Dattaka Chandrika. S. I. 24.
(c) Dattaka Mimansa. S. I. 3 and 9.
(d) Do. do.
(e) Dattaka Chandrika. S. I. 24.
Dattaka Mimansa. S. I, 10.

require that the adopted must be of the same *Gotrum* as his adoptive parents, like many other positions of Hindu Law, are of moral rather than legal prohibition. See 2. Str. p. 74. 79. 96. The question was debated at length in *Durma Samoodhany Ummal* v. *Comara Vencatachella Reddyar*, R. A. 23 of 1851. Mad. S. R. for 1852 p. 111. That was a question as to the succession to the *Torriore* Zemindary. The adopted son was confessedly of another *gotrum, but it not being proved that there was any boy of the late Zemindar's gotrúm available*, the Court held the adoption valid. This qualifying circumstance is to be observed; the Court did not decide that the adoption would have been good if there had been a boy of the *Gotrum* available. It was not necessary to decide the point. The case was argued by the Advocate General Mr. *G. Norton* and Mr. *Dale*, Govt. Pleader, and by Mr. *Ouchterloney* for the Respondent, the adopted son. In the *Vasoореddy case* 4. M. I. A. p. 1 it was not disputed, that among *Soodras* the adoption out of a different *Gotrum* is good. The judgment of the original Court (as set out in p. 42) said, as to the objection that the boy adopted was of a different *gotrum* "Is the act contrary to law? I apprehend the law is restrictive to *Brahmins*, and that not *penally*; a Brahmin may adopt from another *Gotrum, if he cannot find a boy in his own*, and so may a *Soodra*; there is no penalty, as far as I can learn, for the deviation." By "penalty" I apprehend, is meant any invalidity of the adoption, supposing it to have been made in fact. It seems that the law, as originally expounded, only applied to Brahmins, and even as to them, it is not imperative. Strange's Man. § 83 lays down the law generally; and I think that this is the fair result of the authorities. *Sir T. Strange* says, the result of all the authorities on this point (the choice of boy) is, that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who upon spiritual considerations ought to have been preferred. Mr. Ellis says as to *Gotrum*: "The text on which this point of law turns, is, as to its interpretation, more disputed than any other. The readings are various; and what this Pundit has rendered others construe, *not belonging to a distant country*. The general law, however, which governs the choice of a son for adoption, is, that the adopter may legally take him from his own, or from a different *gotra*; but he ought conscientiously to take him from his own; and, in preference, from his *Sapindas* (or near kindred); or, in default of these, from his *ramanodacas*, or *raculyas* (degrees of remote kindred). If, however, a person choose to reverse the prescribed order, though he thereby contracts a sinful taint, he does not incur legal animadversion in consequence; and I doubt if it would be competent for the king, at the suit of any person whatever to prevent the completion of the act;—certainly it could not be reversed, if once performed."

The adoption of an orphan is illegal; for there can be no *giving*,

which is as essential to an adoption as *receiving*.(a) *Subbaluvamall* v. *Amakutt Ummall* 2 Mad. H. Ct. R. p. 129 (over-ruling *Veerapermall Pillay* v. *Narain Pillay* 1 Str. N. of C. 91, as to which see also Sir F. Macnaghten, Cons. p. 210). The elder brother cannot supply the place of the father for the purpose of giving.

Adoption by a father who has a natural son living, is invalid; except where such natural son is incompetent to perform the funeral rites.(b) *Y. Chinna Bassapah and others* v. *Y. Goudapah* P. O. C. case 5. Ib. 1. Morl. Dig. p. 15 § 21.

An adoption made while the adoptive mother is known to be in a state of pregnancy, it being of the essence of the power to adopt, that the party adopting should be hopeless of having issue, is bad. *Narayna Reddy* v. *Vedachella Reddy* Sp. A. 223 of 1859. Mad. S. R. for 1860 p. 97. Mr. J. Strange adds (Manual § 56), even if the wife should give birth to a daughter. This is a very vague provision. At what precise period is it "hopeless" that a man should have a child of his own? It would be impossible for a Court to go into the physiological considerations to which such a question must give rise; and it may be doubted if such a criterion would be upheld in the present day.

Here may be noticed the *Abyymana Putrum* or "son of affection;" who is not adopted, but brought up in the house as a son, a *foster* son. It is sometimes sought to claim for such son, the *status* of an *adopted* son; but the Hindu Law does not recognise any legal *status* for the foster son, either in the matter of performing ceremonies, or of inheritance.(c) See *Sawmy Josyen and others* v. *Ramien* R. A. 74 of 1851 Mad. S. R. for 1852, page 60. *Bhimana Gadu* v. *Tayappah and others* Sp. A. 652 of 1860, Mad. S. R. for 1861, p. 124.

In *Nilmadhab Das* v. *Biswambhar Das and other*. 4. Mad. Jur. p. 328. s. c. 3. Beng. L. R. p. c. p. 27, the same point was decided as to a *Pallaka Putra*, which is another name for a foster son. There the Privy Council decided that the son who was expressly named by the alleged adoptive father his *Pallaka Putra* did not succeed as a *Dattaka Putra* or adopted son. The presumption arising from the religious duty of a Hindu to adopt was there held to be rebutted by the counter-presumption that a father would not *give* his eldest or only son to another as a *Dattaka Putra*. A case of adopting the unmarried daughter of a brother, on condition that her son shall become the "*putrica putra* of the adopter is to be found. *Nowab Rai* v. *Buggawathe Koowur*. 6. Beng. S. D. p. 5. Notwithstanding the authority of *Macnaghten* 1. p. 102. to the contrary. *Ranee Seevagamy Nauchiar* v. *Zemindar of Ramnad* No. 14 of 1814. 1. Mad. Sel.

(a) Mitacshara. Ch. I. S. XI. 9.
(b) Dattaka Mimansa. S. I. 3.
Dattaka Chandrika S. I. 6.
(c) Virhaspathi. II. Dig. B. V. Ch. IV. 279
Adityapurana. Do. 280.
Dattaka Mimansa. S. II. 64.
Dattaka Chandrika. S. II. 66.
Madhavya. 32.
Smriti Chandrika. Ch. IX. 6.

D. p. 101. *Verapermal Pillay* v. *Narrain Pillay* 1. Str. N. of C. p. 78.

Adoption by Widow—In Bengal, the husband's authority is absolutely indispensable to enable a widow to adopt. 2. Macn. p. 182. 189. 2 Str. 68. Ib. 87. *Huradhun Mookurjia* v. *Muthoranath Mookurjia and another* 4 M. I. A. p. 414. *M. Tara Munnee Debia* v. *Dee Narrain* 3 B. S. D. Rep. 387 ib. *Rajah Haimun Chull Sing v. Koomer Gunsheam Sing.* 2 Knapp. 203-221. See *Sootrugun Sutputty* v. *Sabitra Dye. ib. p.* 287.(a)

A son may authorize his mother, in Madras, to adopt another in his stead; but in Bengal she could not do so, without her husband's authority 2. Str. p. 71.(b)

The widow of an adopted son, not his mother-in-law, is the proper person to adopt to her husband. 1. W. and Bühl. p. 80.

A will giving power to adopt is sufficient authority. *S. M. Dossee* v. *Tin Cowry Nundy.* 1 Hyde Rep. 223. According to the Law of *Benares*, the authority of the husband is indispensable. *Raju Sum Shere Mull* v. *Ranee Dilraj Konwur* 2. B. S. D. R. 169. In that case the Pundits declared that the *Dattaka Mimansa* supersedes the *Viramitrodaya*; and the case was relied on in *Rajah Haimun Chull Sing* v. *Komer Gunsheam Sing.* 2 Knapp. 203. But this must be understood of a *specific* school of *Benares* Law; unless indeed it can be attributed to the natural partiality of the Pundits for their own school.(c) The *generic* Benares school, following the *Mitacshara*, which is the prevailing authority in Madras, and Bombay, certainly does not require the sanction of the husband.(d) There is however an important case, *Verbadera Hurryhudree* v. *Baie Ranee, and others*, No. 2376, Special, 1 Morris p. 1, which though a *Bombay* case, was not decided in accordance with the *Mayooka*, but with the *Mitacshara*, at *Benares*, where the authority of the husband was held not to be requisite. In the case, *supra* 2. Knapp. p. 203, a case from the Zillah of *Etawah*, subject to the Benares school, the *Pundits* of the Zillah court declared that the authority of the husband was *not* necessary. The *Pundits* of the *Calcutta Sudder Adawlut*, however, over-ruled this opinion, and held that the authority was necessary, in conformity with which the case was decided by the Sudder, and affirmed by the *Privy Council* on appeal. These two cases are commented on in the *Ramnad* adoption case 2 M. H. Ct. R. p. 216. where the Court says; "One other case was quoted for the appellants as a positive decision that in provinces governed by the Benares School of law the express assent the husband was required, and by the respondents, because it admitted the position that this ancient rule had in many places been modified. The case is reported in II *Knapp*, 203. The question arose in the zillah of Etawah in the North Western Provinces, subject to the Benares School of law, as we know, both

(a) Note to Mitacshara. Ch. I. S. XI. 9.
(b) Vyavahara Mayuka. Ch. IV. S. V. 17.
Vira Mitrodaya. Suth: Note. 6. Stoks's H. L. 673.
(c) Dattaka Mimansa. S. 1. 18.

from its geographical situation and from the *Mitacshara* being quoted as an authority both by the pundits who affirmed and by those who denied the validity of an adoption without the express assent of the husband (page 207 of the report). The Bengal pundits relied upon the *Mitacshara* and the *Dattaca Chandrica*, and the note of Mr. Colebrooke, so often referred to, and the passage of Sir T. Strange were quoted in favour of the validity of the adoption. This therefore is an express decision that there are places, governed by the Benares School of law, in which no assent but that of the husband will be sufficient to validate a widow's adoption.

"It is impossible, however, not to notice the great embarassment felt by the eminent and most cautious Judge who delivered judgment in this case. He repeatedly laments the absence of authority, admits that a rule less strict than that laid down prevails in some places and particularly in the Mahratta States, but he feels unable to say that the ancient rule of law has been relaxed in the place from which this suit came. The actual judgment amounts to little more than saying that it is impossible to say, in opposition to the Pundits of the Sadr Court of Bengal and of the Provincial Court of Benares, that the Court was wrong in considering the assent of the husband absolutely essential. The materials contained in a case which, co-incidently with this, was before the Sadr Court of Bengal (*II Sadr Dew.* 170, 171), were also before the Privy Council. The Pundits of the Sadr Court of Bengal quoted the *Viramitrodaya* and *Sanskar Kaustubha*, works of paramount authority in the special school of Benares, and declared their authority overruled by the *Dattaca Mimámmas* of *Nanda Pandita*. So far, therefore, as the decision goes, it is an authority for the paramount weight of the *Dattaca Mimàmsa* over the treatise specially applicable to Benares, and in a case arising in a zillah proximated to Benares itself. Moreover, the case over-ruled the opinion of Mr. Colebrook, if that opinion can be supposed to mean that the assent of the husband is not indispensable in countries following generally the doctrines of the *Mitacshara*. It is also of course an authority for the position that the *Dattaca Mimámsa* requires the direction of the husband to enable affiliation of the boy given to and accepted by the widow."

In *Behar*, the husband's authority is requisite. *Jai Ram Dhami and others* v. *Musan Dhami*. 5 B. S. D. R. p. 3 ib. 1 Morl: Dig: p. 13. § 8. in *Bareilly*, the husband's authority is essential. *M. Shiboo Koere* v. *Joogun Singh* 8. Sutherl. p. 155. c. r. (*a*)

In *Mithila* a widow cannot adopt even with her husband's authority. (*b*) 1. W. Macn. p. 95. Although, it may be observed that in the case quoted *supra*, from 5. Beng. S. D. A. p. 3, the Pundits gave an opinion, that on *Mithila* consent of kin would supply the place of autho-

(*a*) Dattaka Mimansa. S. I. 18.

(*b*) Vachaspathi Misra. note to Mitacshara Ch. I. S. XI. 9.—

rity from husband. In the *Ramnad case*, the Privy Council remark. (3. Mad. Jur. p. 301.)

"This very point of the widow's right to adopt is an instance of the processs in question. All the Schools accept as authoritative the text of Vasishta, which says, "Nor let a woman give or accept a son unless with the assent of her lord." But the Mithila School apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the Dattaca form, at all. The Bengal School interprets the text as requiring an express permission given by the husband in his life-time, but capable of taking effect after his death; whilst the Mayucha and Koustoobha, treatises which govern the Mahratta School, explain the text away by saying that it applies only to an adoption made in the husband's life-time, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband."

The *Jain* Shastra authorizes a widow to adopt without authority from her husband. *Maharajah Govindnath Ray* v. *Gulal Chund and others* 5 Beng. S. D. R. 276. ib. 1 Morl: Dig: p. 13 § 9. In Bombay, where the *Mahrattas* obey the *Vyavyara Mayuka*, it is clear that the husband's authority is not needed.(a) In the *Ramnad* adoption case, the *Vyavyara Mayuka* was not treated by the High Court as an authority within the Madras Presidency; though when once the authorities relied on by the Court were held to establish the validity, in the Dravida Country, of an adoption by a widow without authority from her husband, it was deemed allowable to look to that and other authorities, to see how the current of custom set in other localities. The High Court in the *Ramnad* case, therefore, did not rely on any of the cases cited from the *Bombay* Reports. Indeed the Court appears to have studiously cut down the reliable authority to its *minimum*, perhaps from a desire to leave no loop-hole for reversal on appeal. The Privy Council, however, took a more liberal view of the long course of authorities, and allowed them greater weight than did the High Court.

In *Bombay*, a widow may legally adopt, without her husband's authority, if she has the consent of the caste and ruling powers. *Sree B. Maharaj* v. *Sree G Maharaj*. 1 Borr. 181 ib. 1 Mor. Dig. p. 13 § 5. She must then adopt the nearest kin to her husband; or if two be equally near, she may adopt either. ib. A widow adopting without her husband's authority, is bound to adopt the husband's brother's son, if such there be. It appears that without the husband's authority she can adopt no one but her husband's brother's

(a) Vyavahara Mayuka. Ch. IV. S. V 18. Also note (*d*) to Ch. IV. S. V. 18.

son. *Hurbut Rao Manker* v. *Govind Rao B. R. Manker*. 2 Borr. 75. ib. Morl : Dig: p. 13 § 7. (a)

In *Bharker Buchajee* v. *Narro Ragonath* Bom. Sel. Rep. p. 24. No. 7 of 1826, there was an express authority from the husband ; but the Pundits declared, that according to the *Mayúka*, the authority was not requisite. In *Abajee Dinker* v. *Wasgeo Gosayee* 3. Morris. 420. where the adoption was opposed by all the *Dyadees*, except the Defendant who gave his son in adoption, the Court held that the husband's authority was not necessary. In *Sree Binjorkurjee Mirkaraj* v. *Sree G. Murkaraj* 1 Borr. p. 101 the same law was affirmed.

In *Hudat Rao Nunker* v. *Govinda Rao B. R. Nunker*. 2 Borr. 85 ; the opinions of no less than 250 Pundits were taken. The adoption was held good; authority was given by the husband. In *Ramayee Hussa Bhice* v. *Shakor Rao Bhidi* 2 Borr. 485 the same law was affirmed. The same point had been, previously to the *Ramnad* case, expressly held by the Madras High Court, in *Appanyengar* v. *Alamutu Umall* Sp. A. 156 of 1857. Mad. S. R. for 1858. p. 5. where in default of authorization by the husband, the consent of his nephew and nearest male relation was held to validate the adoption. We may here note the case of *Soopaloo Umall* v. *Veerasawmy Iyen and others*, No. 157 of 1863, before *Krishnasawmy Iyer* P. S. Ameen of Tanjore, where the question was thus dealt with ; "In regard to the 1st objection, it is to be observed that even supposing that the 2nd Defendant had received no authority from her deceased husband Vythenadien to adopt a son, it has been amply shown by the evidence on Record in the case that her father-in-law Veerasawmy Iyen, who had survived her husband Vythenadien gave his perfect consent to the adoption, and performed himself the "Datta homam" or "sacrifice by fire" connected with the adoption on behalf of the 2nd Defendant. Under the principle of Hindu Law as contained in Strange's Manual (first edition) section 73, and as recognised by the decrees of the Court of Sudder Adawlut in Regular Appeal Suit No. 18 of 1814, (Page 131 of the first Select Decrees) and in Special Appeal No. 156 of 1857 (Page 6 of the Printed Reports for 1858) Veerasawmy Iyen, as the father and nearest male relation of the deceased Vythenadien, was perfectly competent to empower his daughter-in-law the 2nd Defendant (in default of authorization by her deceased husband), to adopt a son. I therefore consider that the objection raised by the Plaintiff to the legality of the adoption on the score of want of permission from the 2nd Defendant's deceased husband, is entirely removed, and that the omission has been legally supplied by the consent of Veerasawmy Iyen to the adoption." (b)

There are also four Pondicherry cases which lay down the law in the same way. As they profess only to expound the law found

Vyavahara Mayuka. Ch. IV. S. V. 18.

(a) Also Note (d) Ch. IV, S. V. 18.

(b) Vyavahara Mayuka. Ch. IV. S. V. 17. Vira Mitrodaya. Suth : Note 6. Stoke's H. L. 673.

existing at the time of the French occupation, they were relied on before the Madras Hight Court in the Ramnad Adoption case. The Court allowed them no weight; but the P. C. on appeal, thought they were good evidence of custom.

They are *Vencatasawmy* v. *Vencataramen Pillay* in 1826; *Sonpamallee* v. *Mootocomaree Pillay*, in the *Court Royal* in 1844. *Soobra Pillay* v. *Condasawmy Pillay* in 1850, before the Court of Appeal; and *Appoo Tumbiran* v. *Tambrohamaid* in 1848, before the Court of Appeal. See also *Ondy Kadáron* v. *Arnachella Kadron* Sp. A. 29 of 1857. Mad. S. R. for 1857, p. 53. 1. Morley Dig. p. 14. § 15, 16, 17.

In the Madras Presidency, within the Dravida country, where the law is different to that of the Bengal Presidency, the want of the husband's authority may be supplied by the consent of the husband's nearest *Sapindas*: or such a one as stands to the widow in the place of her guardian, protector, or adviser, she being in a state of tutelage. This had long been considered the law by the English text-writers, and the Profession, (see 2. Str. 91), till it came to be severely questioned in the *Ramnad Adoption Case*. 2. Mad. H. Ct. R. p. 206.(a)

It was twice solemnly argued before the Court: every authority being ransacked. The High Court (*Holloway* and *Frere* J. J.) decided in favor of the legality of the adoption. The case was appealed to the Privy Council, where the decision of the High Court was affirmed. 3. Madras Jurist. p. 303.

It is true that in *Veerapermall Pillay* v. *Narrain Pillay*, 1 Strange's Notes of Cases p. 103 the Recorder in 1801 said "*that the consent of the husband is indispensable to adoption into this family*"; but this was a mere *obiter dictum*, as in that case there was an express authority from the husband to adopt. It is entirely opposed to his own statement of the law in his subsequently written work. See 1 Str: Hindu Law p. 68. 1st Edition; *et ibi casas*.

The High Court, in the *Ramnad* case, questioned whether consent was anything more than a moral precept; and held that even if it was, the assent of any one of the *Sapindas* would suffice. The same principle was affirmed in *Arundadi Umall* v. *Kuppamal*. 3 M. H. Ct. R. p. 286. where it was held, that a widow cannot make a valid adoption without *either* authority from her husband, *or* consent of a *Sapinda*. In No. 18 of 1814. 1 Mad. Sel. D. p. 101 it was laid down that the want of husband's authority to the widow might be supplied by the consent of *her* blood relations; but it seems now settled by the *Ramnad* case that it must be the consent of the *husband's* relatives or relative. In the case in the *Select Decrees*, there was an express authority in writing from the husband to the widow to adopt, so that the point really did not arise.

On the point as to *what* assent

(a) Yajnyawalkya II. Dig. B. IV. Ch. I. S. I. V. 6.
Vyavahara Mayuka. Ch. IV. S. V. 17.
Vira Mitrodaya. Suth: Note. 6. Stoke's H. L. 673.

of kinsmen is sufficient, the Privy Council in the *Ramnad* case said "The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—*i. e.* undivided—that question is of a comparatively easy solution. In such a case the widow under the law of all the Schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos. Their Lordships do not think there is any ground for saying that the consent of every kinsmen, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and "venerable protector" of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."(*a*)

But adoption by consent of kinsmen cannot take place, when the husband has expressly *forbidden* adoption, or his refusal can be reasonably inferred from his conduct.(*b*) In the *Ramnad* case the Privy Council said, "Again, it appears to their Lordships that inasmuch as the authorities in favor of the widow's power to adopt with the assent of her husband's kinsmen, proceeds in a great measure upon the assumption that his assent to this meritorious act is to be implied

(*a*) Yajnyawalkya. II. Dig. B. IV. Ch. I. S. I. V. 6.
Vyavahara Mayuka. Ch. IV. S. V. 17.
Vera Mitrodaya. Suth. Note 6. to Stoke's H. L. 673.
Vishnu. Sutra 28 to 31. I. W. B. 355.

(*b*) Vasishta. II. Dig. B. V. Ch. IV. S. VIII. V. 273.
Dattaka Chandrika. S. I. 32.

wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites." In that case it was argued that as the late Zemindar had left two daughters, whom he expressly named as his heirs, in a letter to the Collector, without making any mention of adoption, his conduct amounted to an express prohibition; but the Privy Council said, "It has been argued, however, that even if this adoption would have been regular had Ramasami died childless and intestate, his arzi relating to the management and descent of the zemindary contains an indication of his intention that his daughters and their descendants should be his successors and representatives, which ought to be taken to imply a virtual prohibition of the act of adoption by his widow. Their Lordships cannot accede to this argument. Ramasami, no doubt, intended to be represented by his daughters' line, should that line continue. But he made no express provision for its failure, and the same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt when on a new and unforeseen occasion the religious duty arises. His widow has not claimed a power to adopt except on the happening of the contingency for which her husband omitted to provide. And her power so limited, not having been qualified by his disposition must be determined by the general law."

It is a principle of Hindoo Law, that where there is no prohibition there is permission.(a) In *Tarini Charan Choudry* v. *Saroda* 3. Beng. L. R. c. a. j. p. 145, it was held that this principle in the *Dattaca Chandrica* S. 1. v. 31. 32. applies only to *giving*, not to *receiving*. *Sed Qu.*

The law is, I think, the same with respect to a widow, *giving* as *receiving* a son. She may *give* away her son to another in adoption without her husband's authority, if she have the consent of his relatives. In *Arnachellum Pillay* v. *Iyasawmy Pillay*, No. 5 of 1817, Mad. Sel. D. p. 154 it is said, "Although the wife may not have obtained the consent of her husband, during his life, to *give* their child in adoption, it is nevertheless competent to her, having obtained the consent of father, brothers, &c. to give her younger son, in adoption," and in *Arundai Ummall and another* v. *Kuppamal*, 3 Mad. H. Ct. R. p. 283, the Court went very fully into the subject. It said: "The passage from *Vasishta* so often quoted in the other case is relied upon by *Nanda Pandita* is *Dattaca Mimámsa*, Section 1, Art. 15 *et seq.*, in support of his contention that in *receiving* in

(a) Dattaka Chandrika. S. I. 32.

adoption a widow cannot act without her husband's authority. In its unimpaired integrity the passage is an authority for the position that a woman cannot receive in adoption without her husband's assent; and if, as very probably was the case, by 'woman' *Vasishta* meant 'wife,' then it still is very sound law; or if by woman it was intended to include a widow, then certainly there was nothing in it to justify *Nanda Pandita's* contention that a widow could not after her husband's death act upon an authority given by him before his death. The same passage from *Vasishta* cited by *Devanda Bhatta* in the *Dattaca Chandrica*, Section 1, Art. 31, in discussing the *giving* of a son in adoption. He then adds to what *Vasishta* had said by saying that the *giving* may, under certain circumstances, be without the husband's assent. Certainly this addition is not justified by what *Vasishta* said, though probably the mere authority of *Devanda Bhatta* might be now quite sufficient to maintain the position he has chosen to lay down. But he is expressly treating of the *giving* in adoption and not of the *receiving* in adoption; the passage from *Vasishta* relates to both *receiving* and *giving*, and therefore it was properly cited by *Nanda Pandita* when treating of the former, and by *Devanda Bhatta* when treating of the latter; but even if we did not consider the addition made by *Devanda Bhatta* unjustified by any thing in the passage itself, we should have great difficulty in inferring that *Devanda Bhatta* would have thought it right to make the same addition to the passage when treating of *receiving* in adoption. He certainly has not done so expressly, and we think that there is not that similarity between giving and receiving in adoption that would justify our inferring that the same capacity would be required or sufficient for the purposes of the one as the other. The fiction on which adoption is founded is concerned only with the parties receiving in adoption; it is a feigned procreation of a legitimate son; the child must therefore be such an one as might lawfully have been procreated by its adoptive father, and the feigned procreation upon its adoptive mother must be by, or on behalf of him, in a manner in which actual procreation might lawfully have taken place, that is to say either by himself, or by his authority, or by his sapiṇḍas on his behalf. Those who give the child in adoption are doing a mere act which, as far as they are concerned, is untinged by the fiction. Thus the son adopted, at one time at least, need not have been given by any one; he might be one who gave himself, one abandoned by his parents, or one bought by his adoptive father. Neither are the consequences, either religious or temporal, the same to the givers as to the receivers; the primary purpose or consequence of an adoption is the religious benefit to the receivers; the gift of a junior son is not attended by any religious consequence to the givers. Hence the restriction that an only son may not be given, for the adoptive parents or not to acquire the religious benefit of a son at the cost of the loss of the same benefit to the

natural parents. Again the temporal consequences are very different, the adoption in the family of the receivers changes the whole course of what would otherwise be the descent of the family property; in the family of the givers, the effect of the gift is merely to enlarge the shares of the remaining sons."

There are, however, not wanting arguments, or authorities in Hindu texts, for asserting differences between the powers of giving and receiving. The point was much argued in the *Ramnad* case where the High Court said, "The text writers all point to the necessity of the permission on account of the woman's dependence, being all alike based upon the expositiou of the pasage of Vasishta. The Smriti Chahdrica speaks of the need of an independent male and does not seem to care who the male is, and in his later work (Sec. I. 31 and 32) *Sevanda Bhatten* declares the power of a woman to give with her husband's permission if he is present and without it if he be dead, have emigrated or entered a religious order. As has been before shewn, the passage of Vasishta must receive the same interpretation as to giving and receiving, as was clearly the opinion of Nanda Pandita. Then in the next Section is a rule of interpretation very common in the Hindu Law, that where there is no absolute prohibition there is assent, and in the conclusion of the Section he considers that by the use of the disjunctive, "He whom his father *or* mother gives," Yajnyawalcya intended to suggest the independence of the woman. *Vidya Narrainsawmy* construes the text of Yajnyawalcya in the same manner, and after laying down in distinct terms the necessity for an adoption says that it must be with the assent of the father. Looking at the whole course of his reasoning that this sort of adoption was a substitute for the begetting, and at the fact that he has stated that the begetting must be with the consent of the father &c., there can exist little doubt that he would have applied the &c. to the case of adoption."

It is not easy to see why the *principle* should be of less applicable in the one case than in the other.

Consent, it appears may, be presumed, where the ceremonies have been public, in the presence of the party disputing it, as well as of others of the family, and the party now disputing it, had not attempted to show that any opposition was made to the completion of the act. *Arnachellum Pillay* v. *Iyasawmy Pillay* No. 5 of 1817. 1 Mad. Sel. D. p. 154. *Crastnarao Wassadenyi* v. *Ragunauth. Harrichandarji.* Perry's O. C. 150.

Where authority is necessary, or is given, it may be by parol; *Ranee Sivaganny Nauchiar* v. *Zemindar of Ramnad* 1 Mad. Sel. D. p. 104. per *futwah.* It was also so held in *Soondur Komaree Deebia* v. *G. Pershad Tewarree.* 7. M. I. A. p. 54. See 2. Macn. 176.

But if the authority be by parol, it must be strictly proved; and the widow's testimony *alone will not suffice. Sootrugun Sutputty* v. *Sabitra Dye.* 2. Macn. p. 183. s. c. 2 Knapp. 287. *Anon.* East's Notes of cases 10. Ib. 1.

Morl. Dig. p. 15. 2. Str. 71. § 26. *Chowdry Padom Singh* v. *Koer Udaya Singh*. Pr. Council 2. Beng. L. R. p. 101.

It is hardly needful to point out the wisdom of the husband's giving a *written* authority, and that made as public as possible, not only by attestation of respectable, indifferent witnesses, but also by communication to the Revenue authorities, and possibly by registration, under the Registration Act, with a view to the prevention of litigation after his death. Authority may however be established partly on a consideration of probabilities, when there is conflicting evidence as to the *factum* of adoption. *Huradhun Moorkajaya* v. *M. Moorkajaya* 4. M. I. A. p. 414. As to what publicity is desirable, see *Ranee Murmoonkunee* v. *Ramarain Doss*. Cal. Sudd. D. R. for 1857 p. 244, and *Ranee K. Deebia* v. *K. Deebia and another* Ib. p. 1127. There, the deed was not published contemporaneously with its existence; it was not registered; the names of the witnesses except two were in the same hand; and no subsisting witness was produced. And see *Nilmadhub Doss* v. *Biswamber Das*. 4. Mad. Jur. p. 328. s. c. 3. Beng. L. R. p. c. p. 27. *(ante)* where the *factum* of adoption was discredited, partly on a consideration of counter-probabilities.

A husband cannot confer a larger power on his wife than he has himself. *M. Day* v. *O. Day*. 1. Bourke. p. 189. So in *Goosaeen Stree Choundrawalce Bahojee* v. *Girdarajee*. 4. N. W. P. R. p. 226. a power given by a man to each of his two widows to adopt a son, was declared invalid, because the man himself could not have adopted two sons. (a)

No stereotyped form of authority is requisite. Absence of registry and stamp on the alleged instrument of authority to adopt may raise suspicion, but cannot invalidate the deed. *Pritima Soondaree Choudrain* v. *Anund Coomar Chowdry and others*. 6. Suth. c. r. p. 133. s. c. 2. Wyman. 135. An adoption by a widow in Bengal was held invalid, against her husband's will in favour of his brother, declaring that he had *not* given his wife authority to adopt. *Janki Dibeh* v. *Sudasheo Rai and another*. 1. Beng. S. D. R. p. 197. (b)

If a written authority be given, it is not necessary that the boy to be adopted should be specifically designated. In *Veerapermal Pillay* v. *Narrain Pillay*. 1. Str. n. of c. p. 100. It was laid down that a *general* authority, express or implied, is sufficient. There the Court said, "The question here is, whether personal selection by the husband is necessary, where the adoption is to take place after his decease? and whether an authority to his wife to adopt some one to his lineage after his death be not sufficient to validate the particular adoption that takes place under it, though the boy adopted was not named by the husband?

"Consider the nature of the

(a) Dattaka Mimansa. S. I. 15.
Dattaka Chandrika. S. I. 7 and 24.
Jagannada. II. Dig. 3d. B. V. Ch. IV. S. VIII. 388 and 394.
Vishnu Sutra 41. I. W. and B. 341.

(b) Vasishta II. Dig. B. V. Ch. IV. S. VIII. V. 273.
Note to Mitacshara. Ch. I. S. XI. 9.

thing, and the ordinary circumstances of the case; and it will appear how inconvenient and unhappy it would be, did the law require that the dying husband should name the person to be adopted.

"Of the advantages which, in the religious belief of the Natives, depend upon this mode of substitution, where a man has no son of his own, their books are full; and yet, important as they are, we may readily imagine that the provision for it is frequently reserved for the chamber of disease, and the hour of dissolution; when pain and alarm often deprive us of the distinct use of every faculty, and leave us no power but that of expressing a general sentiment, or announcing a vague wish.

"In such a state, will the law of the Hindu have best shewn it's wisdom in a matter upon which his happiness after death is supposed to depend, by requiring that, at the peril of his soul remaining in *put (a)*, he shall specify a name which he cannot recollect, and declare a preference which it may be impossible for him at that moment to feel; or, by leaving it to the affectionate discretion of his surviving partner, consulting, as it is her duty to do, with his nearest friends and relations, to substitute for him the person whom he would in all probability have himself preferred, had he proceeded to adopt in his life-time, or had it occurred to him before his death to express a preference."(a)

If the child should be designated, no other, it has been said, can be adopted. *Grady*. p. 32. Two authorities are referred to for this proposition. The first, *Madras Select Decrees*, it is presumed refers to the Futwah given in the Ramnad Case. p. 101. A careful study of the Pundit's answers will, however, show that the proposition is far too broadly laid down; and that there is nothing in those answers to prevent a widow adopting another child, if the one designated in the authority die, before adoption, or become through physical or other causes, such as performance of the *oopanyanum*, unavailable. The other authority is *D. P. Battacharji* v. *Omakunt Lahoree and others* 4 B. S. D. R. p. 318 Ib. Macn. Cons. H. L. p. 156. Ib. 1 Morl. Dig. p. 16. § 33. There a Hindu widow was authorized by her late husband to adopt an individual named, or, in the event of any bar to his affiliation, any other Brahman's son, and the individual named *was adopted by her*, and died some years afterwards, it was held that she was incompetent, under the terms of the authority given, to make a second adoption, because the *Anumati-patra* gave her authority in a specific case, making the general authority contingent on its non-performance. But this case only shows that where a boy is named, and is actually adopted the power is exhausted, and ineffectual to validate a second adoption professedly made under it.

It would seem to be a question of intention and construction; that is to say, whether the husband's intention was generally to

(a) Yajnyawalkya. II. Dig. B. IV. Ch. I. S. I. V. 6. Vasishta. II. Dig. B. V. Ch. IV. S. VIII. V. 272.

secure to himself the spiritual benefits of adoption, and pay the 'debt' due by him to his ancestors, or to secure a particular boy. Unless the authority contained a positive prohibition against adopting any other than the boy named, or some similar proof of such an intention, a reasonable construction would probably treat the nomination of the individual as an illustration, and perhaps confine the widow's selection to that boy so long as he was available; but hold that the general intention must prevail on the failure of the boy, and the widow be legally capable of adopting another in his stead.(a) In the *Ramnad Case (supra)* the Mad. H. Ct. said, "It would be wholly contrary to the reasoning of Hindu writers to make a process declared to be so imperative depend upon the existence af any particular person. Mr. Ellis has justly remarked that the genius of Hindu Law allows substitution in almost every conceivable case."

Where a man wished to be represented by the unborn son of a particular person whom he names, who has but one son alive at the time, and at the testator's death, the widow is not bound to await the birth of a second son, but may adopt whom she thinks proper. *Verapermal Pillay* v. *Narrain Pillay* 1. Str. N. of C. p. 78.(b)

An authority, it has been said, cannot be given by a Hindu to his wife to adopt, if he die leaving a son surviving. Sp. A. 99 of 1853. *Pootumall and another* v. *Goolam Russool and others.* Mad. S. Rep. for 1854 p. 47. But this must probably be limited to an unconditional power. A power to adopt conditionally on the death of the natural son, would, it is conceived, be perfectly valid.(c)

An adoption by a widow divests the widow of her estate *ipso facto.*(d) She becomes guardian and trustee for the infant adopted. An illustration of this will be found in *Dhurm Doss Pandey and others* v. *Mussumat Shama Soondri Dibiah* 3 M. I. A. 229, where a childless Hindoo, by deed, directed his wife to adopt a child. After his death, his widow brought a suit for a partition, and to be put in possession of her husband's share, in the joint undivided estate. Pending the suit, she adopted a son. It was held that by the Hindoo law, the act of adoption divested the property from the widow and vested it in the adopted son, subject to the maintenance of the widow. Notwithstanding the adoption, the suit was prosecuted in the widow's name, and a Decree made, directing her to be put in possession. It was held, in such circumstances, that she prosecuted the suit as the guardian of the adopted son, and was put into possession as his trustee, and accountable to him for the profits of the property so decreed to her.

In the important case, before referred to, *Durma Samoo dhany Umall* v. *Comaria Veneatachella Reddyar* R. A. 23 of 1851 Mad. S. R. for 1852 p. 111,

(a) Dattaka Mimaasa. S. I. 41.
Dattaka Chandrika. S. 1. 32.

(b) Dattaka Mimansa. S. II. 41.

(c) Dattaka Mimansa. S. 1, 3, 6, and 9.
Dattaka Chandrika. S. 1, 4.

(d) Mitacshara. Ch. II. S. I, 2 and 3.
Do. Ch. I, S. XI. 33.
Menu. Ch. IX. 184. 185.
Dayabhaga. Ch. X: 9 and Ch. XI, 1.

the Court considered this question. "The right of the adopted son," they said, "appears to commence from the date the permission to adopt is given, for in the 4th Answer given by the Pundit in the case of Ramakishen Surkheyl (Sudder Dewany Adawlut Reports, vol. III., page 367,) it is stated, 'the 'permission (which the deceased 'son had left with his widow to 'adopt a son,) being considered, 'in the light of her pregnancy, 'in other words, the boy ulti-'mately adopted, being entitled 'to all the rights of a posthumous 'child.' The same principle was laid down by the Pundit in the case of Ranee Kishen Munee, *versus* Raja Oodwunt Singh (Sudder Dewany Adawlut Reports, vol. III, page 229), Sir Thomas Strange, (vol. 1., page 89,) further states these rights as follows, 'should it have devolved 'upon a widow to adopt, her 'husband's estate descending 'to her on his death, adoption 'subsequent divests her succes-'sion, like the case of a posthu-'mous child.'

"According to this theory the right of the Respondent in this case may be considered antecedent to that of the Appellant, for his right as heir at law, commenced from the day on which the will containing the permission to adopt was written. The Court do not consider the Appellant had any right in the property till the death of her husband, which took place on the day following, when she entered upon possession of it.

"The Court consider the comments of Mr. Colebrook in the case of Ramen, *versus* Cooty Pandyanchee, Zillah Verdhachellum, Strange (vol. II., page 102) to be very strong in favour of the Respondent. Mr. Colebrook remarks, 'presuming the property 'here spoken of as the woman's, to 'have been what devolved upon 'her by the death of her hus-'band, and not to have been pro-'per Stridhan, it ceased to be 'her's at the moment of a valid 'adoption made by her of a son 'to her husband, and herself; in the same manner as property 'coming into the hands of a 'pregnant widow by the same 'means, cannot be used by her, 'as her own, after the birth of 'a son. An adopted child is, in 'most respects, precisely similar 'to a posthumous son. From 'the moment of the adoption 'taking effect, the child became 'heir of the widow's husband; 'and the widow could have no 'other authority but that of mo-'ther and guardian.'"

Soondur Koomaree Debbeea v. *G. Pershad Tewaree* 7 M. I. A. p. 54 incidentally illustrates the same position. There, a childless Hindoo, a member of a divided Hindoo family in *Bengal*, by an *Unomuttee Pottah* authorized his widow to adopt a son for him after his death, and by that instrument made her his heir. His widow exercised the power, and adopted a son for her deceased husband; who died before attaining his majority. It was held that the widow was entitled to a life-estate in her husband's estate after the adopted son's death, either under the deed, or as heir of the adopted son. The adopted son there cut the widow out of her life-estate as long as he lived. In *Bamundoss*

Mookerjee and another v. *Mussamut Tarinee* 7 M. I. A. 169, the same position is illustrated negatively. There, a widow, with authority from her husband to adopt, did not exercise her power. The bare existence of the power was held not to toll her right to sue. When a widow *refused* to exercise the power to adopt given to her by her husband, it was held that she did not forfeit her own interest in her husband's estate. *Prasnamayi Dasi* v. *Kadambini Dasi* 3. Beng. L. R. o. j. p. 86. She is not, prior to the act of adoption, trustee for him she may subsequently adopt *Gobind C. S. Mazoomdar* v. *Anand M. S. Mazoomdar*. 2. Beng. L. R. a. c. p. 313. s. c. 4. Mad. Jur. p. 331. There the Court said, "The pleader, for the special appellant, puts the case in this way: He says that when Shib Chandra died, he gave his widow, Rambha, permission, that is a direction to adopt; that in furtherance of that permission or direction, the said Rambha did adopt, and that by reason of this permission, or direction, the said Rambha, between the years 1256 (1849) and 1258 (1851) must be supposed to have held the estate, not as a person fully representing it, but in trust for a son about to be adopted." Therefore, an alienation by a widow *before* adoption was held valid against her adopted son. *Prannath Rai* v. *Rajah Govind Chandra Rai*. 5. Beng. S. R. p. 37. and her contracts, before adoption, are good. 1 W. and Bühl. 36. But no alienation by her after adoption can affect the adopted son's rights. *Ramkishen Surkheyl* v. *Ms. Sri Mutee Debia* 3. Beng: S. D. p. 367. It is hard to reconcile these decisions with the principle of relation back of adoption to the date of the husband's death.

On the other hand, as the adoption by a widow relates back to the time of her husband's acts: in *Mt. Solukhna* v. *Ramdolal Pandee* 1. Beng. S. D. p. 326. 2. Str. p. 102. a sale by her, between the date of her husband's death and adoption has been held invalid. *Randee Kishennunee* v. *Rajah Oodwunt Sing*. 3 Beng. S. D. R. 228. But in *Rajkistro Roye* v. *K. M. Mohunder*, 3. Suth. c. r. p. 14 it was held, that although an adopted son is not absolutely precluded from questioning the acts done by his adoptive mother during his minority, just as a reversioner might, yet a sale by a widow, *with the consent of all legal heirs* at the time existing, and ratified by decrees of courts, is binding on an adopted son, adopted long after the sale.

A widow with an adopted son cannot contract 1 W. and Bühl. p. 36. So after the adoption, the widow is not entitled to manage the estate, except as guardian for a minor 1. W and Bühl. p. 37· qu. 7. 8. 9. though it is said that the adopted son may covenant not to take or claim possession till his adoptive mother's death. 2. Macn. 183. and that a breach of this works a forfeiture. Ib.

The High Court, Appellate side, (*Lock* and *Macpherson J. J.*) in *Baicuntmoni Roy* v. *Soonder Roy* 255 Wym. held that when a Hindu died in the life-time of his father, leaving one son and a widow with authority to adopt, which she did not exercise till she had succeeded as heir to her

own son, the adopted son obtained all the rights of a natural born son. The Court, say, "In *Bhoohon Moyee Dabee* v. *Ramkistion Achary*, it was held that, "When the property reverted to Surbomungola as mother, and next legal heir of Hur Soonder, Surbomungola then took advantage of the permission given her by her husband and adopted the defendant, who succeeded to the ancestral property, not as the son of Brojo Soonder, but, as contended before us, as the brother of Hur Soonder, and the next legal heir after his mother. It is contended that in no capacity can the defendant succeed, for the property having vested in Hur Soonder on the death of his grandfather, defendant cannot succeed to it as the adopted son of Brojo Soonder, nor can he be looked upon as a brother and legal heir of Hur Soonder, as his adoption did not take place till after the death of Hur Soonder, at a time when Surbomungola held possession of the property, not as widow of Brojo Soonder, but as heir of her son Hur Soondur; and in support of this view of the law, the pleader for the special appellant refers to a case reported in 3 Weekly Reporter, page 18, Privy Council Rulings, Bhoobhun Moyee Dabee *versus* Ram Kishore Acharj, in which it was held that "when the estate of a son is unlimited, and that son marries and leaves a widow his heir, she acquires a vested interest in her husband's property as widow, and a new heir cannot be substituted by adoption to defeat that estate and take as an adopted son what a natural born son would not have taken; that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son, vested in possession, cannot be defeated and diverted; that the rule of Hindoo law is that in the case of inheritance, the person to succeed must be the heir of the last full owner. On the death of the last full owner, his wife succeeds as his heir to a widow's estate, and at her death the person to succeed is the heir at the time of the last owner." This case is not quite the same as the present, but the conclusion come to in the latter part of the judgment of the Privy Council is applicable to the case before us. In the case we have quoted, Gour Kishore died leaving a widow, Chundraboly, and a son, Bhowani, who married Bhoobun Moyee, and died leaving no children. Chundraboly had a power of adoption from her husband. Bhoobun Moyee also claimed a similar authority from her husband, and adopted Rajender Kishore. Chundraboly adopted Ram Kishore. The Sudder Court held that the power to adopt set forth by Bhoobun Moyee was a forgery, and set aside her adoption; that the power given to Chundraboly was genuine, and that the adoption of Ram Kishen was valid, and he was entitled to the estate. The Privy Council held that though the adoption by Chundraboly was good, her adopted son could not divest the widow of Bhowany, the late full owner of the estate. But their Lordships remark, "If Bhowany had died unmarried, his mother Chundraboly would have been his heir, and the question of adoption would have stood upon quite different grounds. By exercising the power of adop-

tion, she would have divested no estate but her own, and this would have brought the case within the ordinary rule." In the case supposed by the Privy Council, their Lordships carefully point out that in the event of Bhowany's dying unmarried, Chundraboly would have succeeded as *his* heir, and that if she had adopted, such adoption would have brought the case under the ordinary rule. What then would have been the position of Chundraboly's adopted son? He would have been the son of her husband Gour Kishore, and would succeed as brother of Bhowanny to the ancestral property, if he succeeded at all. The inference to be drawn from what is said by the Privy Council is that in the event of Chundraboly succeeding as heir to her own son, and exercising the power of adoption, the son so adopted would obtain the rights of a natural born son. Now in the case before us, Surbomungola was, when she made the adoption, in the very position in which Chunderboly might have been, *viz.*, she was in possession of her son Hur-Soonder's property as his heir, and by making the adoption she divested only her own estate. It is immaterial that Birjo Soonder, the father of Hur Soonder, died before his father Ram Kishore, for Surbomungola held not as his heir, but as heir of her son, and her adoption of the defendant placed him in the position of a brother to Huro Soonder, and as such entitled after Surbomungola to succeed to Hur Soonder's estate. No texts or precedents have been quoted by either party in support of or against the allegation made by the special appellant, but, looking to the judgment of the Privy Council in the case of Bhoobun Moyee, we think that Surbomungola had not lost the right to exercise the power of adoption, and if so, that the defendant, her adopted son, is entitled to succeed to the property in dispute."

A widow may adopt at any time. *Anon*: East's notes of cases 10. though in *Verapermal Pillay* v. *Narrain Pillay* 1. Str. n. of c. p. 100 it is said that the sooner she adopts, the better. In the *Ramnad* case the husband died in 1830, the widow adopted in 1847.

But in a Calcutta case, in which the widow waited till all the male relations of her husband were dead, and only asserted her alleged authority to adopt, when the property had vested in the widow of the last male member, the Court set aside the adoption. This, however, only proceeded on their disbelief of any authority, from her conduct. *Gobind Soonduree Debia* v. *J. Debia and others* 3 Suth: c. r. p. 66. The law will not suspend the ordinary course of inheritance, pending a possible adoption, if there be others on whom the succession can legally devolve. *Dookeah Dosse* v. *R. B. Moozoomdar and others*. 2 Wym: c. r. p. 273. See also *Bamundoss Mookerjea* v. *Mussamut Tarinee* 7: Moore's I. A. p. 169. *Bhobun Moyee Dabia* v. *Ramkishore Acharjee* 3. Suth: P. C. p. 15. s. c. 10. Moore's I. A. p. 279.

Legal Effects of.—An adoption operates as a total affiliation into the new family, and disruption from his natural family, as

before remarked. The adopted forfeits, therefore, all right to share in the property of his natural family.(a) *Srinath Serma* v. *Radhakaunt.* 1. Beng. S. D. p. 15. *Duttnaraen Sing* v. *Ujeet Sing and others* Ib. 20. 2. Macn. p. 183. *Gomarrata Amby* v. *Menguteson and others* Sp. A. 15 of 1859. Mad. S. R. for 1859. p. 81. In *Seenivassa Iyengar* v. *Kuppen Iyengar,* Sp. A. 177 of 1861, and *Rayan Krishnama Charryar* v. *Kuppen Iyengar* Sp. A. 182 of 1861, 1 M. H. Ct. R. p. 180, (affirming Sp. A. 15 of 1859) it was held that a member of the natural family, cannot succeed to one taken out of the family by adoption. This is the converse of the case Sp. A. 15 of 1859. The severance it was said, of an adopted son from his natural family is so complete, that no material rights as to succession to property can arise between them. The Court said, "The prominent question to be decided in this suit is whether a member of the natural family can succeed to one taken out of the family by adoption? The settlement of this question depends upon whether the severance of the person adopted from his natural family is so complete that no mutual rights between them to property, in succession the one to the other, can arise, or whether the severance is not so thorough a one as to shut out such succession the one to the other.

"In *Special Appeal No.* 15 *of* 1859 this question came before the late Sudder Court, when it was sought to establish the succession of a person adopted to his natural brother. The pundits, relying on the reasoning of Crí Ráma Pandita asserted that the right of succession did exist. But the Court, after examining the basis of their opinion and other law authorities, were satisfied that the gift made of one for adoption created an entire and irrevocable severance of him from his natural family.

"We are of opinion they said, that the above decision is founded upon a just appreciation of the principle of an adoption, whereby the son of one man ceases to be such in the eye of the law and becomes the son of another man, in heriting thenceforth in his adoptive family and having no more rights in his own family. If it would be a violation of that principle to allow a person adopted to return to his natural family and take up their rights, it would be a still greater violation thereof to introduce to the rights in the adoptive family the natural kindred of the adopted person, who assuredly never had any part or title in the adoptive family or in their possession.

We observe, furthermore, that in the Mitákshará, the great authority in this Presidency on the law of inheritance, no place has been given in the natural family for the re-introduction into the line of heirs of one taken out of that family by adoption, and none in the adoptive family for the admission of those in the natural family." See Stokes' notes *et ibi casas.*(b)

Menu. Ch. IX. 142.
(a) Smriti Chandrika Ch. X. 14, Madhavya pp. 24 31.
(b) Menu. Ch. IX. 142.
Dattaka Mimansa. S. VI. 6 and 7.
Dattaka Chandrika. S. II. 18 and 19.
Vyavahara Mayuka. Ch. IV. S. V. 21 & 23.
Mitacshara. Ch. II. S. I. 2 and 3.

In Sp. A. 192 of 1855 In *Subrahmanya Mudali* v. *Parvati Umall* Sp. A. 71 of 1858. Mad. S. R. for 1859. p. 265. it was held that if the adopted dies without issue, the property of his adoptive father passes to the father's own heirs.(a) So an adopted son is not liable for his natural father's debts.(b) 2. Str. p. 99. 1. W. and Bühl. p. 34; nor the natural father for the debts of the adopted son. 2. Str. p. 99.

The adoption by females on the Western coast has the same effect in cutting off the adopted from his natural family. *Tottacara M. M. Narraina Numboodripad* v. *P. M. Trivicrama Numboodripad and others* Sp. A. 36 of 1855, Mad. S. R. for 1855 p. 125.

Where a widow adopts, the son succeeds, to his adoptive grand-father as well as father. *Gowerbullub* v. *Juggernatpersaud Mitter*. Sir F. Macn. 159.

An adopted son succeeds collaterally as well as lineally in the adoptive family.(c) *Sumboo Chunder Chowdry and another* v. *Narainan Dibeh and another*, 3 Knapp. P. C. 55. s. c. 5. Suth. p. c. 100, which is the Leading Case upon this point. See this case followed in *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*. 9. Suth c. r. p. 423. See also *Shamchunder and Roodercchunder* v. *Narayni Dibeh and another* 1. Beng. S. D. R. p. 209. and I. W. and 1 Bühl. p. 203. He does not succeed to his adoptive *maternal* grand-father's estate, when there are collateral male heirs. *Morun Moee Debia* v. *Bejoy Kishto Gossamee*. 1. Cal. F. B. R. p. 121.

He does not succeed to the property of his natural family *Sreenath Serma* v. *Radha Kaunt*. Sir. F. Macn. p. 129.(d)

In *Mitthila*, an adoption in the *Kritrima* form does not convey any right to collateral inheritance.(e) It operates only on the contracting parties. *M. Shiba Kovee and others* v. *Pogun Singh and others*, and *Beebe Singh and others* v. *M. Bussant Koeree and others*. A son adopted by a husband does not succeed as heir to the wife *Sreenarrain Rai* v. *Bhya Jah* 2. Beng. S. D. R. p. 23: nor is a son adopted by a wife, heir to her husband, ib. but a son adopted by both, is heir to both. Ib. A son adopted by a widow with her husband's consent, will not inherit her property, which will go to her father's brothers. 2. Bomb. S. A. R. p. 178.

An adopted son cannot abandon his *status*. *Iyatoray Chetty* v. *Mootia Taver* Sp. A. 3 of 1855 Mad. S. R. for 1855 p. 41. nor can he be disinherited by a second adoption. *Daee* v. *Mootee Nuttoo* 1 Borr. 75. Ib. 1 Mor. Dig. p. 24. § 102. *Sudanund Mohapattur* v. *Bonomallee and others*. 1. Marshall R. p. 317.

A Goorookul is succeeded by his son in his right to perform

(a) Mitacshara. Ch. II. S. I. 2 and 3.
(b) Menu. Ch. IX. 142.
Yajnyawalkya. I. Dig. B. I. Ch. V. V. 170 and 171.
Vrihaspathi. do. V. 167 & 174.
Vishnu. do. V. 168.
Narada. do. V. 169 & 172.
Katyayana. do. V. 173.
Menu. Ch. IX. 159.

(c) Dattaka Chandrika. S. V. 24.
Mitacshara. Ch. I. S. XI. 30 and 31.

(d) Menu. Ch. IX. 142.
Mitacshara. Ch. I. S. XI. 32.
Dattaka Mimansa. S. VI. 6 and 7.
Dattaka Chandrika. S. II. 18 and 19.

(e) Deviata Nirnaya. of Vachaspathe Misra. Suth. Note 21. Stokes's H. L. 678.

poojah, though he may have been adopted to another. *Sooboo Goorookul* v. *Lagoo Umall and another*. Sp. A. 108 of 1856. Mad. S. R. for 1856 p. 80. A. *Dwyamushanun* (See 1. Str. 74. 87.) succeeds by inheritance both to his adoptive and natural father. *Permal Naicken* v. *Pottee Umall* Sp. A. 11 of 1849. Mad. S. R. for 1851. p. 234. and See 2. Macn. p. 193.

A valid adoption cannot be cancelled by will. *Gopemoyen Deb* v. *Rajah Raya Kisen*. East's Notes of cases, (case 75.) Ib. 1 M. Dig. p. 24 § 101: s. c. Sir F. Macn. nor on the ground of informality. *Sree B. Murkaraj* v. *Sree G. Mukaraj* 1, Borr. 181. Ib. 1 Morl. Dig. p. 24 § 103. 2. Str. 101. It can only be set aside on the ground of such physical or moral defects, as would make the rules of inheritance applicable. 1. W. and Bühl. p. 35. It has been said that where a son was adopted on undertaking to perform certain conditions, his infraction will nullify the adoption. Sed. *quær*. *Mt. Tara Munee Debia* v. *Deo Narayun Rai and another* 3. Beng. S. D. p. 387. There is a case, *Ballabakant Chowdree* v. *Kishenprea Dasea Chowdrains and another* in 6. Beng. S. D. p. 219 where it was held that an alleged adoption by a person in a state of insensibility from dangerous illness, by a verbal declaration and without the performance of prescribed ceremonies was invalid. It may be suggested that the first of these reasons, the insensibility of the adopter, was enough to render the adoption invalid; and in fact this is not a case of setting aside an invalid adoption, but declaring that there never was any adoption at all.

An adoption enures to the spiritual benefit of the wife as well as of the husband. *Vasoореddy Case*. 4 M. I. A. p. 1. and in *Durma Samoodhany Umall* v. *Coomara Vencatachella Reddyar* R. A. 23 of 1851. Mad. S. R. for 1852, p. 111, the Court said: "It need not be dwelt upon, of how much importance it is to the supposed spiritual welfare of a Hindoo to possess a son by whom his funeral ceremonies may be performed. Even in the case of an adoption with his permission by his widow, it is for his sake chiefly the son is adopted. On this point Sir Thomas Strange remarks (vol. 1, p. 67) "the better reason therefore perhaps is, that the necessity of a son to celebrate the funeral rite, regards the man, rather than the woman, who depends less for redemption upon such means; so that, whenever a woman, duly authorized, adopts, it is on her husband's account, and for his sake, not for her own, a child thus adopted acquires all the rights of a son, a child adopted by the widow or widows will stand in the same relation to the deceased husband's family, as he would have done had he been adopted by the husband himself, in his life-time." (Macnaghten's Commentaries of Hindoo Law, P. 157.) To the same effect Sir Thomas Strange, (vol. 1., P. 89) remarks "adoption being a substitution for a son begotten, its effect, is by transferring the adopted from his own family to constitute him son to the adopter, with a consequent exchange of rights and duties; of these the principal are the right of succession to the

adopter on the one hand; with the correlative duty of performing for him his last obsequies on the other. *The right attaches to the entire property of the adopter, real and personal.*" In Sutherland's Treatise on the Hindoo Law of adoption, it is laid down in pages 228 and 229 that a legally adopted son is "invested with every filial right, in respect to his adoptive father, of whose family he becomes a member," and "he likewise represents the legitimate son in relationship to his adoptive mother, whose ancestors are his maternal grandsires."

Where, after an adoption, a natural son is born, his birth divests the adopted son of three-fourths of the inheritance.(a) *Preag Sing* v. *Ajoodya Sing.* 4. Beng. S. D. R. p. 96. 1. W. and Bühl. p. 22. 43. questions. 15. 16. 17. 2. Macn. p. 183.

An adopted son represents his adoptive father, and is entitled to the share which his father would have obtained; when he comes to share with heirs other than the legitimately begotten sons of his adoptive father, in the property of kinsmen, he takes the same share that they would have.

In *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia.* 9. Suth. c. r. p. 423, the Court, in ruling this point said;

"We have now to determine whether Woomanath, being an adopted son, would take only a third, or is entitled to share equally with plaintiff in the property left by Romanath Chuckerbutty. There is no contention that if after a son be adopted, a son be born of the body, the latter is entitled to the larger portion of the inheritance whether two-thirds or three-fourths, and the former only to the remainder. There can also, we believe, be no doubt that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, where there is no such son subsequently born. The decisions of the late Sudder Court quoted in the margin, and the following passage from the *Vyavasta Durpana*, page 887 of the 2nd Edition, Verse 584, supported by authorites, prove that such is the case:—"An "absolute Dattaka properly "adopted ceasing to belong to "the Gotra of his natural father, "becomes a member of the fa-"mily of his adopter, and re-"presents his legitimately be-"gotten son, and the duties and "the rights of the legitimately "begotten *(Ourasa)* son devolve "upon him." A case is quoted to us from II Macnaghten, page 69 *ff.* Looking at the answer given, we have some doubt whether there was not some confusion in the Pundit's mind as to the position of the adopted son in that case, but whether this be so or not, that case is not applicable to the present.

"It appears to us that the position of an adopted son is affected only by the birth of a subsequent legitimately begotten son of the adopting father, that when an adopted son comes to share, with heirs other than the legitimately

(a) Dattaka Mimansa S. V. 42.
* Dattaka Chandrika, S. II. 11 S. v. 17. and 19.
Mit. Ch. I. S. XI. 24. 25. 26.
Smiriti Chandrika. Ch. X. 16.
Madhavya. 28.

begotten sons of his adoptive father in the property of kinsmen, he takes the same share that they would have. He represents his adoptive father, and is entitled to the share which his father would have obtained. In the present case, plaintiff and defendant are in equal relationship to Romanath Chuckerbutty; their respective grandfathers were his first cousins, and their respective fathers were his first cousins once removed, so that if the property had been inherited either by their grandfathers or by their fathers, the shares of each would have been equal; and, such being the case, there is no reason why the plaintiff and defendant should not each take the share to which their respective fathers were entitled.

"A passage from the *Dattaka Chandrika*, Section V, para. 25, has been quoted to us to prove that the adopted son of a brother does not receive the same share as his uncle; but all that the passage appears to rule is, that the adopted son of one adopted succeeds only to his adoptive father's estate. In the present case, we find that the adoptive father would have been entitled to a moiety of the property left by Romanath Chuckerbutty, and his son is, we think, entitled to that share. The rule requiring an adopted son to take a smaller share than a son of the body does not, in our opinion, hold good in this case, for the claimants do not derive their title from the same father."

Where an adoption is invalid, the boy reverts to his natural family;(a) because in fact, there has been no adoption. Therefore, he can have no claim to maintenance by his adoptive father. *Bawane Sunkara Pundit* v. *Arraboh Umall*, 1 Mad. H. C. 363 (over ruling Strange Man. § 119) and see the same point in *Iyaven Muppanar* v. *Niladatihi Umall and others* 1 Mad. H. Court. R. p. 45. There the Court said, "In reason and good sense it would seem hardly a matter for doubt that where no valid adoption, in other words, no adoption has taken place, no claim of right in respect of the legal relationship of adoption can properly be enforced at law. But in this case it was contended on the part of the plaintiff (the appellant) that although Kistnaji Koneri pundit was precluded from all right to inherit in the family of the defendant's husband, yet that by reason of the forms and ceremonies attending an adoption having been gone through, the law gave him the right to claim maintenance from the defendant, and that such right passed to plaintiff as his son by a valid adoption, just as it would have passed to his natural son. In support of this, reference was made to Mr. Strange's *Manual*, sections 120 and 197, Sir Thomas Strange's *Hindu Law*, 1, p. 82, and to the *Dattaka Chandrika* by Sutherland, section 1, clauses 14, 15, and section 6, clause 4.

"Now the passages in the two former works rest upon the authority of the *Dattaka Chandrika* and the *Mitakshara* on inheritance chap. 1, sec. XI, clause 9; and having considered what is to be

(a) Dattaka Mimansa, S III. 3.

found in these authorities, we are of opinion that no legal ground is afforded for the present claim to maintenance. Mr. Strange in section 119 of the second edition of his *Manual* no doubt states broadly that a boy, after a gift made for adoption, cannot be re-admitted to his family rights should his adoption "not stand good in law," and that devoid of inheritance, he has a claim to maintenance. And an observation to the same general effect occurs in a late judgment delivered by Mr. Strange, then a Judge of this Court, in the case of *Ayyavu Muppanar* v. *Niladatchi Ammál.* But Sir Thomas Strange's observations are confined to the adoption of one of a different class from the adopter, and he puts the claim to maintenance on the ground that such an adoption, while it divests the child of his natural claims, does not entitle him to all the incidents of an unexceptionable adoption and enable him effectually to perform those rites which are essential to the right to inherit; and this in effect is supported by the *Dattaka Chandrika,* section 1, clauses 14, 15. Where however both the author and the commentators to whom he refers, make the claim of adopted sons of a different class, more expressly and distinctly to rest upon the ground, that although not qualified to present the oblations and perform the rites essential to inheritance, they acquire a filial relationship, (as is there said) " by reason of their being beneficial in perpetuating the name and the like: but as they are beneficial in a small degree, they only receive maintenance." See also the *Dattaka Mimamsa,* section 3.

"The doctrine so laid down treats the adoption as one that may be made and existing, and of validity for one of the purposes of adoption according to Menu, quoted in Clause 3 of the same section; though not for the other purpose of " the funeral cake, water and solemn rites." How far this doctrine now holds good as law we are not called upon to consider, as it has, we think, no application to the present case. But we may observe that there appears to be nothing in the Mitakshara to the same effect, and Sir Thomas Strange in a note to the passage before referred to, questions the claim to maintenance and says, " Mr. Sutherland, translator of the Treatise on adoption, being of opinion that the adoption being void, the natural rights remain, and applied to the present case, this opinion of a very high authority upon the subject is entitled to the more weight, that it is clearly logical. If there was no adoption nothing can have been acquired and nothing lost.

"In the present case the question does not turn upon any personal disqualification on the part of Kistnaji Koneri Pnndit, and we think the natural rights of the plaintiff remain in law quite unaffected. In this case the authority of the defendant's husband was indispensable to the validity of the adoption relied upon by the plaintiff: without it the absolute essentials of adoption for civil purposes, the giving and receiving, could not with any legal effect take place; and it would be strangely inconsistent and unreasonable, if the mere formal performance of certain customary rites and ceremonies connected with adoption, which as regards

the *civil* rights of the person adopted, would probably not be treated as necessary to its legal efficacy, (1 Sir Thomas Strange's *Hindu Law*, 96; *Veeraperumal Pillay* v. *Narrain Pillay*, were held to confer the right to enforce maintenance by a civil suit. We think there is nothing in Hindú law which requires or would warrant such a decision and that as in this case there was no valid adoption by the defendant the suit must fail."

Unchallenged for twelve years, an adoption cannot be set aside on the ground of illegality. In *Garuda Vencata N. Sunneassy* v. *G. Jugganaikooloo* R. A 20 of 1853. M. S. R. for 1854 p. 27. the Court said, "The fact of the adoption having been established, the Court of Sudder Udawlut are of opinion, that the second ground urged by the Appellant in her Appeal Petition, is fatal to the Plaintiff's claim; and that, with reference to the time which has elapsed between the act of adoption and the institution of the Suit, which is shown to have exceeded 12 years, the Plaintiff's right of action is barred by the Law of Limitations. An adoption is an act carrying with it publicity; and the parties interested in it, and among them the Plaintiff, cannot but have been well aware of its occurrence. It has been proved in the present instance, that on the death of the adoptive father, the funeral rites were performed by the adopted son and at the death of the natural father, which took place subsequently, that his rites were performed by a junior son. Moreover, on the death of the adoptive father, the registry of the property belonging to his branch was transferred to the name of the adopted son, and the said property was managed in his name by his natural father, Bava Moodelly. The Court cannot think that Bava Moodelly, supposing that he had any interest in so doing, which is not apparent, could have blinded the eyes of the plaintiff as to the nature of the said management, so as to have distinguished from him the fact of the adoption; especially in the face of the public acts which must have accompanied the adoption, and those of a like nature that followed it in the transfer of the registry, and the performance of the adoptive father's funeral rites. The Court therefore conclude, that the Plaintiff must have been cognizant of the adoption at the period of its occurrence, and that the Suit is barred by the Statute of Limitations, as he failed to object to it for a period of 15 years."

By the present law of Limitations Act XIV of 1859 § 12, the same time bars.

An adoption in 1833 was not allowed to be questioned in 1850. In *Sree K. Bungar Rauza* v. *S. K. Vizia Gopala Rauza* R. A. 39, 40, 41. of 1850 Mad. S. R. for 1858, p. 83—89, an adoption made in 1833 by females on the Malabar coast, could not be challenged by them in 1858. *Pullyar J. N.* v. *Andoyenum and another* R. A. 52 of 1861. Mad. S. R. for 1862, p. 59.

It is to be observed, that in all these cases the Statute of Limitations had absolutely run.

When the family do not know of the adoption, the Statute of Li-

mitations begins to run against them from its disclosure. A Judgment on the *factum* of adoption is a judgment *in rem*; it can only be questioned by showing it was obtained by fraud, or collusion, *Raj Kusto Roy* v. *K. Moyoondar* 3 Suth. c. r. p. 14. See *Goodeve* on Evidence. p. 288-9-90 page 36, 37 of W. R. for Ap. 1865 No. 12 R. C. cases. And consult *Tarini Charan Chowdry* v. *Saroda Sundari Dasi* 3. Beng. L. R. c. a. j. p. 145. *et ibi casas.*

There are cases which depend on acquiescence; so in the *Vasooreddy* case 4 M. I. A. p. 102 the Court considered whether the subsequent recognition by *Jaganada* of the adoption was equivalent to previous assent. On coming of age, he had assented to a *division* on the faith of a valid adoption. They held that he had not that full knowledge of the facts and circumstances before him which would make it binding upon him; but they also questioned, whether, according to Hindu Law, subsequent ratification would be equivalent to previous consent. Per *Mr. Pemberton Leigh.* See p. p. 82 and 103.

The same point arose in the *Ramnad Adoption* case. There, *Sivasamy*, one of the Sapindas, and, as it seemed, a minor at the date of the adoption, subsequently solemnly recognised and ratified it by deed. The High Court held that such subsequent ratification was equivalent to prior consent. "The case of Sivaswamy," they said, "is the only one which remains. It is clear that he was not present; whether his mere absence without it being shown that the absence was owing to dissent could have any effect whatever is very doubtful. It was alleged that he was a minor, and his admissions when in litigation with the Zemindar were quoted to show this. It is quite clear, however, that if those admissions were much more unequivocal than they are, they could not prove the fact against the parties to this cause. It must be taken therefore that he did not at the time assent. It is clear, however, that he gave a subsequent assent, if such assent would avail. To assume that it would not be to treat an adoption as a solemnity and this present assent as absolutely indispensable to its validity. We do not think that this is a reasonably view. The essence of the transaction is the giving and receiving. To render that giving and receiving a valid adoption some contend that the assent of certain persons is necessary. We are unable to see the least reason for contending that a principle which is to be found in the law of all countries does not properly apply to the Hindu law, particularly when we find in favored transactions such as this the constant recurrence of the maxim that the absence of positive dissent shall be taken as assent. This goes much further than other systems of which the maxim is generally '*Qui tacet non utique fatetur*: *sed tamen verum est, eum non negare.*'

"We should not therefore have thought it necessary to notice this matter, as we consider it free from doubt, if it had not been for an extra-judicial remark of Lord *Kingsdown* (then Mr. Pemberton Leigh) at page 103 of Vol.

IV of Moore's Indian Appeals. The Privy Council there ruled the adoption to be in its essence altogether invalid, and this is a material distinction between that case and the present. That an assent given upon the mistake of fact should be powerless to set up the transaction was only natural."

In the Privy Council it was not necessary to affirm this ruling, as the assent or non-assent of *Sivasawmy* was held to be immaterial.

BYKUNTNATH ROY CHOWDHRY v. N. P. POGOSE.

5. SUTHERLAND C. R. p. 2. S. C. 1. WYMAN. p. 56. C. R.

CASE No. 300 OF 1865.

Regular Appeal from a decision passed by the Judge of Dacca, dated the 12th August 1865.

BYKUNTNATH ROY CHOWDHRY (Defendant) *Appellant,*

versus.

MR. N. P. POGOSE (Plaintiff) *Respondent.*

Suit laid at Rupees 3,801-9.

Section 2 Regulation XXVI, 1793, *extends the term of minority of proprietors of estates paying revenue to Government, from the end of the 15th to the end of the 18th year, in respect of all acts done by such proprietors, both as to matters connected with real estate, and matters of personal contract.*

Minors have a qualified power of contracting, and an implied or express contract for necessaries is binding absolutely on a minor.

As a minor cannot himself, by reason of insufficient capacity for business, state and settle an account so as to be bound thereby, so neither can he authorize another party to do for him that which he cannot do himself.

The plaintiff in this suit, Mr. N. P. Pogose, sues the defendant, Bykuntnath Roy Chowdhry, a zemindar of Zillah Mymensingh, for a sum of money due on three bonds executed by him: one for 1,450 rupees dated 6th Aghran 1260, another for 550 rupees dated 30th Aghran of that year, and a third for 250 rupees dated 29th Pous of the same year, and for 680 rupees under an account stated and signed by Bindabun Chunder Mojoondar, the gomashtah of the defendant.

The plaintiff alleges that, in consequence of disputes between the defendant and his mother, regarding the property left by his father, Gokoolnath Roy Chowdhry, having risen to a great height, he left his house and went to

Bagoonbary to secure the assistance of Khajah Abdool Gunee, the zemindar of Baliati, and several other persons, residents of Dacca ; but, having failed in all these places, he, defendant, with Bindabun Chunder Moojoondar, his well-wisher Prannath Gossain, and his spiritual guide Issurchunder Gossain, came to him, plaintiff, and made him many entreaties ; that upon this, he, without taking any writing from him, but merely out of kindness to him whom he thought a man of noble descent laboring under difficulties, assisted him ; that the amount claimed was spent for his maintenance and other useful purposes, and, as he, plaintiff, cannot recover the sum in any other way, he brings the present action.

The defendant in his statement avers that, during his minority, he, in consequence of misunderstandings with his mother, went to Dacca ; that, after he had arrived there, plaintiff persuaded him to carry on lawsuits with his mother with a view of forwarding his own ends, and procured his signature to certain bonds ; that, when he signed them, he was a minor, and incapable of understanding the effect of what he was doing and therefore cannot be liable under them ; that Bindabun Chunder Moojoomdar was never his servant, but a creature of the plaintiff, and plaintiff could obtain from him any account he pleased ; that on no account can he be justly made liable for the present demand.

The Judge of Dacca, who tried the case, remarks as follows :—" The execution of the bond has been proved " by the evidence of the witnesses. They were also ad- " mitted by the defendant himself before the Magistrate, " and their execution is not now denied, the only plea " being minority at the time of their execution. The " plea is wholly untenable. The age for a Hindoo male " to emerge from minority as regards Civil liability " (with exception of the charge of a landed estate " paying revenue to Government) is 15 years, and it is " scarcely pretended that the defendant was not more " than 15 years of age at the time he executed these " bonds, and received the money from the plaintiff. The " evidence of plaintiff's witnesses proves that defendant " was over 15 then, and the *junmo putro* said to have " been drawn out at the time of his adoption places it " beyond doubt, copy of it having been placed for the " defence.

" In respect of the money due on the account for which " there is no bond, I do not consider that the plaintiff

"has shown that Bindabun was authorized to sign any "account so as to make it binding on the defendant, but "I do think that the evidence in support of plaintiff's case "is sufficient to prove that the money was advanced by "the plaintiff, and that the defendant is liable for it. The "defendant was summoned by the Court to give evidence, "but refused to attend, alleging that he was afraid of "being arrested under a decree against him by another "party. There is no question raised by the defence re- "garding any item in the account which is contested only "on the same ground as the bonds, *viz.* minority, and "that it was signed by Bindabun who alleged to be a ser- "vant of plaintiff instead of defendant. This man gave "his evidence in a straight-forward manner, and produced "his sunnud of appointment in defendant's service ; whilst "it seems to me that the evidence of the witnesses for "the defence brought to prove that Bindabun was a "servant of Pogose, the plaintiff, seemed open to grave "suspicion. Being of opinion, therefore, that the defend- "ant is not protected by minority, I decree the suit for "the principal in full with interest on the amount covered "by the bonds, and cost, with interest on the total "amount of the decree from this date."

From the decision passed by the Judge an appeal has been preferred to this Court by the defendant below. He has urged the very same points which he has urged unsuccessfully in the Court of first instance. The defendant is admittedly a proprietor of an estate paying revenue to Government, and he admittedly had not reached the end of his eighteenth year, and was, in fact, a little over 15 years of age when he executed the bonds on which the present suit is mainly based. The question then arises, is he bound by his acts ; or, in other words, do the terms of Section 2 Regulation XXVI of 1793 extend the period of minority in the case of proprietors of estates generally to the end of the eighteenth year, and prolong the period of legal non-liability in all matters to that age ; or, as held by the Judge, do they merely extend minority in matters connected with the minor's real estate, leaving him in all matters of personal contract in just the same position in which he was before the law above cited was enacted *viz.* a minor only to the end of the 15th year ?

We think that the question admits of one answer only. Minority is a legal personal disability. It may be placed arbitrarily at one age or another ; but having been determined to extend, either generally or as to a particular class up to a certain age, it is accompanied by complete

legal disability, unless the law has expressly declared otherwise. Now the terms of Section 2 of Regulation XXVI of 1793 are to the following effect :—"The Rule "contained in Section 28 of Regulation X of 1793, which "limits the minority of Hindoo and Mahomedan proprie- "tors of estates paying revenue to Government to the expi- "ration of the fifteenth year, is hereby rescinded, and the "minority of such proprietors is declared to extend to the "end of the eighteenth year." These words clearly extend the term of minority to a class of persons but do limit it to a class of subjects ; and we have no doubt, therefore, that they extend the legal disability attending minority to any act which a proprietor of estates under the full age of 18 years might happen to be engaged in. Moreover, the reason of the thing supports the law as we read it : for it is unnecessary to remark at length as to the unreasonableness of finding the same person a minor as to some transactions, and a major as to others, and liable on account of some, non-liable on account of others.

As, then, we are of opinion that the defendant was a minor at the time of the execution of the bonds upon which this action is mainly based, it would ordinarily have decided so much of the case as is covered by them ; but the plaintiff has attempted in his written statement to make out that the bonds were given for necessaries. Now, there can be no doubt that infants have a qualified power of contracting, and that an implied or express contract for necessaries is binding absolutely on an infant. But we have no evidence before us showing that the bonds were given on account of necessaries supplied or executed on account of expenses incurred for the minor's benefit and advantage ; and in its absence, and looking to all the facts of the case, we are clearly of opinion that the bonds were executed by the minor under circumstances of very questionable propriety as far as the plaintiff is concerned.

As to the sum covered by the alleged account stated and signed by Bindabun Chunder, we agree with the Judge in thinking it not proved that Bindabun Chunder had any authority from the defendant to sign such an account, and to make him liable for it. Moreover, as the minor could not himself, by reason of insufficient capacity for business, state and settle an account so as to be bound thereby, neither could he authorize a party to do that for him which he could not do himself. But, undoubtedly, had plaintiff with reason laid out money in the purchase of necessaries for the minor, such money might be re-

covered from the latter in an action for money paid. Now, though this suit is not brought in this form, we should not have refused to decree to plaintiff any sum paid with reason on behalf of the minor, had we been convinced that he had supplied to him what the law considers necessary. That, however, we think it not evident. We rather look upon the transactions involved in the present suit as a series of attempts on the part of plaintiff to wring from the youth, incapacity, and necessities of the defendant, monies which, under no circumstances, would the law assist him to recover. Under this view, we reverse the judgment of the Lower Court, and dismiss the plaintiff's suit with costs.

Duration of Minority.—Minority in Madras, Bombay, Mittila, and Benares, ends at the seventeenth birthday, whereon the sixteenth year is complete. *Luchman Doss* v. *Rup Chand.* 5. Bengal S. D. R. p. 114. Ib. 1. Morl. Dig. p. 302. § 1. *et. ibi. notam* 1. *Hari Mahadaji Joshi* v. *Vasudev Moreshvar Joshi.* 2. Bomb. H. Ct. R. p. 344. *Nocoor Bysaik* v. *Gopul Chund Seal.* Mort. p. 82. In *Vydealingum* v. *Mooneachilly and others.* Mad. S. R. for 1856, p. 19, it is said that a Hindu is of age after his seventeenth year, which no doubt, should be read seventeenth birthday. See 2. Str. H. L. p. 78. 1. Coleb Dig. p. 201. (3rd. Ed.) 1. Macn. Pr. 103. Ch. VII. Steel's Hindu Castes III. 27. 2. Str. 206. 207, where doubts appear to have been expressed as to the termination of minority arising at the end of the fifteenth, sixteenth, seventeenth, or eighteenth year. But the decided cases, and the opinion of the profession, place it at the seventeenth birthday.(a) In Bengal, however, according to the case of *Bykuntnath Roy Chowdhry* v. *N. Pogose* 5. Sutherl. p. 2, it seems to have been taken for granted that majority arrives with the end of the fifteenth year, or sixteenth birth day: differing from 5. Beng. S. D. R. p. 114. *Supra.*(b) It was stated on behalf of the Hindu candidates for the Civil Service, at the recent examination in London, that majority at sixteen in Bengal was understood to mean the end of the fifteenth year. And in *Juggessur Hato* v. *Deobo Moyee Dosse.* 1. Suthl. 75 c. r. the end of the fifteenth year was held to be the termination of minority according to the Bengal school. In Bengal, the majority of a female is reached on her completing fifteen years.(c) 2. Macn. p. 220. The Court of Wards Act V of 1802 § 4, (Madras) and the corresponding Acts for the other Presidencies, defer the legal majority of minors,

(a) Menu. Ch. VIII. 27.
Ratna cara. II. Dig. 243.
Smritisaora. Vireovara and Bhavadeni. 2.
* Str. H. L. 76.
(b & c) Menu. Ch. VIII. 148.
Catyayana. I. Dig. B. I. Ch. V. V. 187.
Misra. on do. I. Dig. Ch. I. V. 148.
Smirti. I. D. B. II. Ch. IV. S. I. V. 15.
Dattaka Mimansa. S. IV. 47.
Sricrishna. Dayabagha. 58.

wards of the Court, to the completion to the eighteenth year. See *Modhoo Soodun Manjee* v. *Dabee Gobind Manjee* 10. Suth. f. b. r. p. 37. *Purmessa Ojha* v. *M. Goolbee.* 11. Suth. c. r. p. 446. In. *Ranee Roshun Jahan* v. *Rajah Syud Enauyt Hoossain.* 5. Suth. p. 4. c. r. the 18 years rule under the Court of Wards' Act was held to be applicable to proprietors out of, as well as in possession of lands paying revenue to government. It has been held in Bengal, that a father can defer by will the majority of his son. *Ranee Hurroosoondery* v. *Cowar Kishonauth Roy.* 1. Fult. 393. ib. 1. Morl. Dig. p. 302. § 2. In Madras, it has been sought to exercise a similar power more than once. Where the family is undivided, the son by his very birth, according to the *Mitacshara*, has an incohate right, which the father cannot in any way defeat or limit. So in the case of *Conniah Chetty's infant son, by his Guardian* v. *The Executors of Conniah Chetty's Will*, before the Madras High Court, *Holloway J.* held the Testator's will to be inoperative, so far as it sought to postpone the vesting of the property in the son at the legal majority of sixteen, and to declare that the property should not vest until the son had attained the age of twenty five years.(a)

The age of the party may be ascertained and established by the personal inspection of the judge. *Aswudda Narayana Sastri* v. *Luchmi Ummall and another.* Madras Sud. R. for 1860. p. 87. On a *Habeas Corpus* case, *In re Mooniatta*, reported in the Madras Native Herald for 1847. p. 193. before Sir William Burton, in the late Supreme Court, the judge ordered an inspection by a medical man, to ascertain the girl's age, and declared her an infant thereon.

Effect of Infant's acts—Infancy has been said to be a complete legal disability, affecting all the acts of the infant. See *O'Donnell* v. *Maha Rajah Buddinauth*, Morton p. 84 and note (*b*)(b) But it will be found that there is much similarity between the Hindu and English Law as to the effect of the acts of an infant, and those done on his behalf. See the Leading Case (*supra*). See also *Rennie* v. *Gunga Narrain Chowdry* 3. Sutherl. p. 10. c. r. But an infant cannot state or settle an account, or authorize any one to do so for him.(c) He cannot execute an assignment.(d) If he does, it will not bind his heirs. *Doe dem Brijogopee Dabia* v. *Seebrosoondery Dabee.* 1. Fult. 308. note. He is not competent to sell his ancestral landed estate. 2. Macn. p. 305.(e) So he cannot execute a lease ;(f) *Kallupnath Singh* v. *Kumlaput Jah and others.* 4. Beng. S. D. p. 339. Ib. 1. Morl. Dig. p. 302. § 3. See 2. Str. p. 80. But it is added, in 2. Macn. p. 305, that the sale would not be void, if the infant had received the purchase-money. A sale by a minor is not *ipso facto* void, and therefore a

(a) Smirti. I. Dig. B. II. Ch. IV. S. I. V. 15.
Mitacshara Ch. I. S. I. 27.
(b) Narada. I. Dig. B. II. Ch. IV. S. II. V. 53.
Mitakshara on judicature I. Macnaughten. 225.
Yajnyawalkya. I. Dig. B. II. Ch. IV. S. II. V. 56.
Menu. Ch. VIII. 163.
(c d e f) Menu. Ch. VIII. 163.
Yajnyawalkya. I. Dig. B. II. Ch. IV. S. II. V. 58.

purchaser for value without notice was protected in such a case. *L. Rennie* v. *Gunga Narrain Chowdry.* 3. Sutherl. p. 10. c. r. *Kummoroodeen Shaik* v. *Shaik Bhadoo* 11. Suth. c. r. p. 134. A minor widow can adopt a son to her husband, *ex necessitate rei.* A minor cannot give an effective consent; except as to necessaries. *Vullish Ummah Rajah* v. *Conyomen Odea Varmah Rajah and others.* Mad. Sud. R. for 1853. p. 2. So an infant cannot make a will.(a) *Bamundoss Mookerjea* v. *Musamut Turinee.* 7. Moore's I. A. p. 193. 196. s. p. *Barroosoondry Dossee* v. *Cosinauth Bysack.* Macn. Con. p. 11. s. c. Sir H. East's N. of C. 2. Morl. Dig. p. 198. See Sir F. Macn. p. 78.

Infancy is ordinarily a good plea to any action brought either during infancy, or after majority, in respect to acts done by the Defendant during his minority; supposing of course that he is not thereby seeking to take advantage of his own fraud. *Yergaludda Ramasawmy* v. *Guddum Lukshmana* S. Ap. 67. of 1847. Madr. S. R. for 1849. p. 6. But when, on coming of age, he himself sues, the Court will take care that he shall not defraud others, by cancelling arrangements made for his benefit, *durante minoritate. Moodoolkrishna Naick* v. *Tandavany and others.* Madr. Sud. R. for 1852. p. 105. So in *Soobah Pirshee Lal Jha* v. *Soobah Doorgah Lal Jha, and in Soobah Doorgah Lal Jha* v. *Rajah Nulamund Singh.* 7 Suth. c. r. p. 74. s. c. 3. Wym. c. r. p. 80, it was held that a minor, on coming of age, could not disaffirm his guardian's act as far as it was unfavourable to him, and affirm it as far as it was favourable. See *Vasooreddy Case.* 4. M. I. A. p. 1. He is bound to elect either to affirm or disaffirm the transaction altogether. Nor can a party executing an instrument on behalf of an infant plead the minority to avoid the act. *Canaka Krishnum* v. *K. Cottavapah.* Mad. S. R. for 1855. p. 184. An infant, on coming of age, can confirm his own acts, or those of his guardian done on his behalf: *Kummoroodeen Shaik* v. *Shaik Bhadoo.* 11. Suth. c. r. p. 134. and this either by implication or expressly. By implication, when he lies by; and by the length of his silence, may be assumed to have acquiesced, or the like. Thus in *Baboo Naika and others* v. *Nagappa, alias Timapah,* Mad. S. R. for 1862. p. 84, where the Plaintiff's mother had been referred to a civil suit in 1845, in respect to a matter touching her infant son's rights, but neither she nor the Plaintiff took any steps for thirteen years, he was held to have acquiesced in his mother's neglect. So in *Narayen* v. *Tumberatty and others.* 1. Mad. Sel. D. p. 422, where a Plaintiff neglected to sue for his alleged rights for seventeen years after coming of age, he was held to be barred. See *Doe Dem Bhobannypersaud Ghose* v. *Teerpoorachun Mitter.* 1. Morley. 41. In *Sakarat Alvan* v. *Narayanasami Alvan.* Mad. S. R. for 1861. p. 40, five years silence, after attaining majority, was held proof of

(a) Narada. I. Dig. B. II. Ch. IV. S. V. 53.

acquiescence on part of the minor as to a sale by his grand-father, eighteen years before, of ancestral land, for payment of arrears of Government kist.

A suit brought nine years after majority was held to lie, by a widow, for the recovery of her husband's property. *Gaurama* v. *Devaka*. Mad. S. R. for 1860. p. 153. In *Doe dem Mongooney Dossee and another* v. *Goorooper-saud Bose*. Sir, H. East's n. of c. 2 Morl. Dig. p. 188, it was held that ten years acquiescence by the Plaintiff, after he came of age, in a sale effected by his mother (guardian) during his minority, barred him from questioning the validity of her act. See also *Purmessa Ojha* v. *Mt. Goolbee* 11. Suth. c. r. p. 446.

The late Madras Sudder Adawlut Court carried the doctrine of *laches* and *acquiescence* to extraordinary lengths and conclusions. It is not necessary to cite the cases, which have been since all over-ruled. In *Rama Row* v. *Rajah Row and others*. 2. Mad. H. Court R. p. 114 it was held that the equitable doctrine of laches and acquiescence does not apply to suits, for which a period of limitation is provided by the limitation act. There *Scotland*, C. J. said, "We think it clear the Civil Judge was also wrong in deciding that the plaintiff was precluded from maintaining the suit by reason of laches and acquiescence on the part of his father and guardian, and here we may state, as our present opinion, that it will be found, when necessary to decide the point, that the equitable doctrine of laches and acquiescence is not applicable to suits in the Mofussil for which a period of limitation is provided by the Limitation Act, and that lapse of time, as a defence to such suits, can only be relied upon when under the Act it has become a bar." See also *Peddamuthulatty and others* v. *N. Timma Reddy*. 2. Mad. H. Ct. R. p. 270. *Civa Rau Nanaji* v. *Jevana Rau and others*. Ib. p. 34. But infancy does not deprive a man of the ordinary limitation of 12 years, and drive him to section XI. of Act VIII. of 1859. "This Section," writes Mr. *Thomson*, "was not intended to place minors under a special disability as contrasted with persons who are not minors, but to make a special concession in their favour. A party coming into Court after attaining his majority, if he is within the ordinary terms of limitation provided by Section 1, is not bound to avail himself of Section 11, Section is complete in itself and applies to all suits. Section 11, is an additional or supplementary provision, giving minors liberty to take a fresh start in computing limitation from the time of their attaining majority, provided that the privilege so accorded is limited to three years. For instance, where the prescribed period of limitation is twelve years, and the plaintiff's time for suing computed from his original cause of action, accruing in his minority, has also expired during his minority, or has less than three years to run at the tine when he attains majority, he will have full three years within which to sue after he attains majority. But where the prescribed period has not so expired, and there are

more than three years of the period of limitation still to run after the plaintiff attains majority, he may bring his suit at any time within the period remaining to complete the prescribed term of twelve years. So if there be six years of a term of twelve years still to run when the plaintiff attains majority, he will have six years to sue in under the ordinary rule, and is in no way compelled by the provisions of Section 11, to bring his suit within three years. *Kalee Doss Chatterjee* v. *Beyaree Loll Mookerjee. W. R. II.* 305. See to the same effect, *Soorodhuny Dossee* v. *Bissumbhur Sircar. W. R. III.* 21; *Abbas Ali* v. *Hurish Chunder Nag. W. R. V.* 204; *Luchmen Singh* v. *Bibee Miriam. W. R. V.* 219." And see acc. *Ramanuja Charryar* v. *Venkatasvara Iyengar.* 4. Mad. H. Ct. R. p. 54. In *Ram Autar* v. *Ram Jas and others.* N. W. P. R. for 1869. App. Jur. p. 22. an objection appears to have been taken to the capacity of a minor to sue at all, even by representative, during his infancy, on the ground of three years being given him, after majority, by the law of limitation. The objection was, of course, overruled.

He must of necessity be barred, if he allows the statutory bar of limitations to run against him before seeking a remedy. *Nazuker Bibi* v. *Charles Culpepper.* Mad. Sud. R. for 1861. p. 92. Voluntary absence, after attaining majority, will not bar the Statute's running. *Venkatasubah Pattar* v. *Giri Ummall* 2. Mad. H. Ct. R. p. 113.

As instances of *express* confirmation on coming of age, see *Chetty Colum Comara Venkatachella Reddyar* v. *Rajah Rungasawmy Streemunth Iyengar Bahadoor.* 8 Moore's I. A. p. 319; where an adopted son recognised the validity of charges made on the estate by his adoptive mother, in discharge of debts due by his adoptive father; his act was held to bind him, without reference to the question of the widow's power to charge the estate. See also *Golaub Koonwurree Beebee* v. *Eshan Chunder Chowdoree and others.* 8. Moore's I. A. p. 447, where infants, on coming of age, executed a *kistbundee* for the repayment, by instalments, of the amount due on sums borrowed by their guardian, the executor of their father's will; and subsequently repudiated the instrument, in a suit brought against them by the lender, upon it, and charged fraud and collusion between the lender and executor. Their act was held to bind them. In *Doe dem Bhobanypersaud Ghose* v. *Teerapoorachurn Mittur,* Sir H. East's N. of C. 2. Morl. Dig. p. 100, the following questions were put to the Pundits: "1st, If elder Hindu managing brother, being of age, and having a younger brother, under age sell a part of the fixed property, without fraud or collusion with the purchaser, and carry the purchase-money to the credit of the joint estate: and if the younger brother, two years after he comes of age, give an express consent to the sale; will that bind him?

2dly, Would it bind him, if he, having full knowledge of the sale and of the joint estate being credited with the purchase-money, lay by for five years and a half

without objection, seeing the purchaser laying out large sums of money in building on the land?

The pundits answered both these questions in the affirmative.

The Court gave judgment for the defendants. *In Nurat Syud Asadoolah Khan* v. *Sreenurchund Duka Mahajun* Beng. S. D. R. for 1848, it was held that part payment by the infant, after coming of age, on a bond executed during minority by his guardian, was a confirmation of the transaction.

Guardian; who may be.—This has already been partly considered under the head of marriage, *supra* p. 2. A father is the natural guardian.(a) If he neglect his duties, the mother may act.(b) *Baee Gunga* v. *Mundas*. Bellas: p. 16. Ib. 2. Morl. Dig. n. s. p. 175. § 1. and see *In re Danapa Bin Subrao*. 1. Bomb. H. Ct. R. p. 134. A father may appoint another than the mother to be guardian of his minor children. *Soobá Pirthee Lal Jha and others*, v. *Soobah Doorga Lal Jha and others and Soobah Doorga Lal Jah* v. *Rajah Neelanund Singh* 7. Suth. c. r. p. 73. s. c. 3. Wym. p. 80. s. c. 2. Mad. Jur. p. 101. The appointment need not be in writing. Ib.(c) But it is said, 2. Str. p. 203. that the Hindu Law does not make mention of a testamentary guardian. The Hindu Law knew no such instrument as a will, whence this observation arose; but now that the validity of wills, within certain limits, is upheld, there can be no reason why a testamentary guardian should not be recognised. A mother is entitled in preference to an uncle. 2. Macn. p. 205. A step-mother is also prior in right to a paternal uncle, even though the parents should have made the child over to him. *Nunnoo Lal* v. *Mt. Sobadra*. 2. N. W. P. R. Ib. 1. Morl. Dig. N. S. p. 175. § 2. The mother is preferred to the infant's brother. *Kooldup Narrain* v. *Rajbunsee Kowur*. 7. Beng. S. D. R. p. 395. Ib. 1. Morl. Dig. n. s. p. 175. §. 3. A minor on coming of age supersedes his half-brothers in the guardianship of his uterine brothers. *Dabee Singh and others* v. *Brijsod Singh and others* 5. N. W. P. R. p. 336. Ib. 1. Morl. Dig. n. s. p. 176. § 4. The elder brother, becomes guardian where the mother has turned recluse.(d) *Iswhur Chunder Surmad* v. *Brijonath Surma Chowdree* 7. Beng. S. D. p. 559. Ib. 1. Morl. Dig. n. s. p. 176. § 11. The mother of minor widow is guardian, in preference to widow's elder-sister-in-law. 1. Bühl. p. 73. A grand-mother under a *Nymputtroo* ousts both father and grandfather. *S. Ranee Shorbharmohee and another* v. *S. Ranee Bromohobee and another*. 1. Wym. p. 277. c. r.

Duties and powers of guardian: A guardian is bound to show *optima fides* in every transaction on behalf of his ward. *Ram Lekraj Singh* v. *Gooryasuker*. 2. Wyman c. r. p. 23. He is bound to show that he acted in all trans-

(a) Menu. II. 228. IX. 108.
Yajnyawalkya. II. Dig. B. V. Ch. II. V. 77.
Devala. do. V. 80.

(b) Jagannada. II. Dig. p. 576.

(c) Mit. on evidence I. Macn. H. L. 270.

(d) Menu. Ch. IX. 105. and 108.
Catyayana. II. Dig. B. V. Ch. VIII. V. 453.

actions of sale, borrowing, mortgage, and the like, on considerations of necessity and advantage, and not on a calculation of a possible benefit to the infant. ib.(a) By the application of these tests it will generally be a matter of no difficulty to determine whether or no any particular transaction by a guardian on behalf of his ward ought to be upheld or the reverse. Thus debts for necessaries contracted for him by his guardian bind him.(b) 2. Macn. p. 289. A conveyance by a guardian must be shown to be for the minor's benefit.(c) In *Lal lahBoodmull, father and guardian of Lekraj Singh, minor* v. *Lallah Gouree Sunker*. 4. Suth c. r. p. 71. s. c. 1. Wyman p. 16. the validity of a compromise effected by the father, as the natural guardian of an expectant heir, during his minority, by which the immediate possession of half the property was obtained by surrender of all claim to the reversion of the other half, was declared to depend on whether the transaction was, at the time, one reasonably beneficial for the minor. The Court said; "If a party in possession in his own right had made such a bargain, he might have considered the probability of the widow's long life, and made it with his eyes open for his own advantage; and in such a case the mere chance that the widow soon died, would give him no claim to relief. But the circumstances are different when a father, as guardian, so deals with his ward's property. The suspicion arises that he may, more for himself than for his ward, look to the advantage of immediate possession of half as compared to the surrender of half the reversion, and such proceedings by a guardian must be narrowly scrutinized. *Primâ facie* such a bargain seems to be a sacrifice of the ward's rights, unless some immediate necessity, sufficient to justify such a sacrifice, is shown."(d)

So a sale by guardian for the purpose of paying off the debts contracted by a minor's father is valid. *Babâ Kumla Purshad Narain Singh* v. *Tokhe Lall Shaboo and others*. 2. Wym. c. r. p. 46.(e) There, the three requisites, necessity, *bonâ fides*, benefit to the infant, coalesced. The Court said, "though the estate was probably worth more then, and certainly worth more now, yet, looking to the indebtedness of the father and to the host of petty incumbrances with which this very property was burdened at the time when the defendants purchased it, we do not feel warranted in affirmig that even then it was sold for a price disproportionately inadequate, or for a price which, coupled with all the other facts and circumstances, would justify us in annulling the sale and, as urged by Mr. Peterson, in replacing the appellant in possession of his property on the sole condition that he should repay the mohajuns their original debt, the interest being set-of against the proceeds which they had all along enjoyed. 'In adequacy of consideration can in no case be said as a conclusion of law to establish *malâ fides*.'

(a) Kulaka Butta on Menu. Ch. VIII. 27. Mit. Ch. I. S. I. 28.
(b & c) Kulaka Butta on Menu. Ch. VIII. 27. (d & e) Vide C last page.

(Smith's Leading Cases, Vol. I, p. 11). We do not think the observations recorded at pages 615, 917 of the Sudder Dewanny Adawlut's decision applicable to the present suit. Those recorded at page 1647 of the same volume are much more to the purpose, and again, referring to the case of Hunooman Purshad, therein alluded to, we may quote their lordships' words to dispose of this case ;—" The actual pressure on the estate, the danger to be averted, or the benefit to be conferred on it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on necessity, which his wrong has helped to cause."(a) Applying these grave and weighty observations to the case before us, we think that the mohajuns, having established indisputably the existence of a pressure on the estate, not grounded on any necessities of their own causing, but on the extravagance of the father, have not been shown to have practised any deception on the guardians or to have prevented intending purchasers from coming forward, or to have used their advantages with any unfairness or with anything more than that regard for their own interests by which persons in such a case might fairly be actuated, or to have bought the property for a sum, under all the circumstances, highly inadequate to the real value of the estate at the time."

The Leading Case on this point is *Hunoomanpershaud Panday* v. *M. Baboosee Munraj Koonweeree*. 6. Moore's I. A. p. 392, where it was laid down that " the power of a Manager for an infant heir to charge ancestral estate by loan or mortgage, is, by the Hindoo law, a limited and qualified power, which can only be exercised rightly by the Manager in a case of need, or for the benefit of the estate.(b) But where the charge is one that a prudent owner would make in order to benefit the estate, a *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred, in the particular instance, are the criteria to be regarded."

See also *Rampershad Sookool* v. *Rajender Sahai*. 2. Wyman c. r. p. 317 ; in which the evidence as to the necessity of a sale was canvassed. See *Bodh Mull* v. *Gouree Sunkhur* 6. Suthl. c. r. 16. *Baboo K. P. Narrain Singh* v. *Nokh Lal Sahoo* ib. i. r. p. 30. See also *Moonean* v. *Moonesawmy Moodelly* Sp. Ap. 22 of 1858. Mad. S. R. for 1858 p. 104. *Deoputty Koonwar* v. *Dhumoo Lall* 11. Suth. c. r. p. 240. *Hurree Ram* v. *Jeetun Ram* 12. Suth. c. r. p. 378. Money borrowed by a guardian for the performance of the *Shrad* of the minor's father binds the estate.(c) In *Sookina Banoo* v. *Hurroo Churn Burrey*. 2. Wym, ; c. r. p. 84, *aliter*, as to mothers *Shrad*.(d)

The party dealing with a guar-

(a) Vyavahara Mayuka. Ch. IX. 10.
(b) Kula Butta on Mena. Ch. VIII. 27. Mitacshara. Ch. I. S. I. 28.
(c & d) Mitacshara. Ch. I. S. I. 28.

dian whether as purchaser, mortgagee, lender, or the like, is bound ordinarily to inquire into the necessity of the transaction. Thus, in *Hunnomanpershaud Panday* v. *M. Baboose Munraj Koonweree.* 6. Moore's I. A. *supra,* it was laid down that "a lender, however, in such circumstances, is bound to inquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate.(*a*) If he does inquire, and acts honestly, the real existence of an alleged and reasonably-credited necessity is not a condition precedent to the validity of his charge, which renders him bound to see to the application of the money." and again, on p. 418 :

"Next, as to the consideration for the bond. The argument for the Appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point ; for according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *primâ facie* to support the charge, and the *onus* of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the *Sudder Dewanny Adawlut* at *Agra,* in the case of *Oomed Rai* v. *Heera Law* (6 Sud. Dew. N. W. P. 218), was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate ; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger ; consequently, this *dictum* may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on

(*a*) Vyavahara Mayuka. Ch. IX. 10. Yajnyawalkya I. Dig. B. II. Ch. IV. S. II. V. 58.

them. Thus, where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

It is to be observed that the representations by the Manager accompanying the loan as part of the *res gestee*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of *Calcutta* between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir *Edward Hyde East*, reported in his decisions in the 2nd volume of *Morley's* "Digest, seems the foundation of this practice." (See also the case of *Brown* v. *Ram Kunaee Dutt*, 11 Sud. Dew. Rep. 791.)"

This case was followed in *Tandavaraya Mudali* v. *Valli Ummall.* 1. Mad. H. Ct. R. p. 398, where the Court said, "We see no reason to question the doctrine laid down by the Civil Judge in this case, as regards a family of brothers or other co-parceners resident together under ordinary circumstances; but in the present instance we observe that the Civil Judge has omitted to notice an important feature in the case, that the only co-parcener of the first defendant whose rights are affected by the act of the latter, was, according to the plaintiff's own statement, a minor at the time of the execution of the bond, and unable consequently to protect his own interests. Adverting therefore to the nature of the pleas urged by the second defendant we consider that on the principle enunciated in the case *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Konweree*, it was incumbent on the plaintiff to adduce some proof that the debt was contracted *bonâ fide*, and for the benefit of the family; but this she has altogether failed to do." So in *Sheo Persaud Ram* v. *Thakoor Pershaud and others.* 5. Suth. p. 103. the sale by the guardian of a minor was set aside, although there was no finding of actual fraud on the part of the purchaser, but substantially a finding that he did not act *bonâ fide*, *i. e.*, that, if in fact he believed that there was a legal necessity for the sale which the guardian was making, he had not exercised due care and attention in arriving at the belief.(a)

In *Dagdubin Daud Teli Pardeshi* v. *Shekh Saheb Valad Badruddin Kamble.* 2. Bomb. H. Ct. R, p. 369 it was said that the *onus* of proving that a sale by his guardian of a minor's property was necessary, and for his benefit, lies upon the purchaser.(b) Adequacy of consideration is an important point to be considered in determining this question. Ib. In

(a & b) Kulaka Butta on Menu. Ch. VIII. 27.

Yajnyawalkya. I. Dig. B. II. Ch. IV. S. II. V. 58.
Menu. Ch. VIII. 163.

Lallah Bunsudheer v. *Konwur Bindeseree Dutt Singh.* 10. Moore's I. A. p. 254, it was decided that the Hindu law casts on a party who sets up a charge on a minor's estate, created in his favour by the guardian, the *onus* of showing that at least he had good ground for supposing that the transaction was for the benefit of the minor's estate.(a) Where a transaction is, on the face of it, prejudicial, the strongest proof will be required, to show that it is really for the benefit of the infant. *Ranee Joshum Jahan* v. *Rajah Syud Enait Hoossein.* 1. Wym. p. 64. In *Poolunder Singh* v. *Ram Pershaud.* 2. H. Ct. R. N. W. P. p. 147 the defendant, a mortgagee, was held bound to prove that due inquiries were made as to the necessity for the loan, and that it was incurred by the manager for the benefit of the estate. It is not necessary to show that such necessities actually existed, but that reasonable inquiry was made as to their existence and the object for which the loan was intended. ib. The mere execution of a charge by a manager, securing a proper debt, is not to be viewed as an improvident act; and a *bonâ fide* creditor is not to suffer when he has acted honestly, and with due caution, but is himself deceived. 6. Moore's I. A. *supra.* See acc. *Vaduli Ramakristnama* v. *Manda Appiya and others.* 2. Mad. H. Ct. R. p. 407. Where the charge is one that a prudent owner would make, in order to benefit the estate, a *bonâ fide* lender is not affected by the precedent mismanagement of the estate. Ib. If the danger to the estate arises from any misconduct to which the lender has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour, against the heir, grounded on a necessity which his own wrong had helped to cause. Ib.(b) In *Gour Pershaud Pershaub* v. *Sheo Pershaud Ram and others.* 1. Wym. c. r. p. 159. the Court said;

"We think the finding of the Lower Court, although it does not amount to a finding of fraud or collusion on the part of the purchaser, is substantially a declaration that he did not act *bonâ fide*; that is to say, that if in fact he believed that there was a legal necessity for the sale which the guardian was making, he had not exercised due care and attention in arriving at that belief. The Court has found that the sale was made ostensibly for the purpose of raising money for the minor's marriage, but not in fact for that purpose; that the money, when raised, was not applied towards the marriage; and that there were ample funds belonging to the estate, from which the marriage expenses might and ought to have been paid. The Court declares such a sale unwarrantable, and orders it to be set aside. Under the circumstances, it seems clear that the purchaser cannot have made, and it is not shown that he did make, any real attempt to satisfy himself as to the necessity for the sale. He is therefore not a purchaser who is protected by the ruling of the Privy Council in the case of Hunooman Pershad Panday (6 Moore's Indian Appeal Cases, 393), and the sale is rightly set aside, and the pur-

(a) Vide (*a* & *b*) last page.

(b) Menu. Ch. VIII. 165.

chaser must give up possession to the plaintiff. It follows almost as a necessary consequence that the purchaser must pay wassilut for the term during which he has been in possession."

Where the guardian is dealing with the property for family purposes, the purchaser &c., is not bound to see to the application of the purchase-money. The infant will be bound, though the money is in fact misapplied. *Sundarayan* v. *Sitamarayan* Mad. S. R. for 1861. p. 1. So in *M. Sookina Banoo* v. *Hurro Churn Bussey*. 2. Wym. c. r. p. 34, where money was borrowed by the mother and brother of a minor for his use, the lender was not held bound to see to the appropriation of the money.

But where a loan was made to a mother, as guardian, but not for the use of the infant, it was held to be not recoverable from him on his attaining his majority. *Syud Gholam Hoossain Alley* v. *Satur Khan*. 2. Mad. Sel. D. p. 37 : a Mahomedan case ; but the principle would apply to a Hindu : for the loan could not be said to be for the infant's benefit.

An infant is bound by all *proper* acts done on his behalf by his guardian. In *Temmakal* v. *Subbammal* 2. Mad. H. Ct. R. p. 47, it was held that all acts of the guardian of a Hindoo infant, which are such as the infant might, if of age, reasonably and prudently do for himself, must be upheld, when done for him by his guardian. In that case the act of the guardian in referring to a Punchayet of their caste a question of customary partition, whether it should be according to *patri bhaga* or *putra bhaga* was upheld. See also *Baboo Naika* v. *Nagappa alias Temmapah*. Mad. S. R. for 1862. p. 84. and *Rajah Cauminary Bungaroo Mootoorauzoo and others* v. *Peruma and others ;* Mad. S. R. for 1855. p. 99. where the Court was divided as to the necessity of the loans the subject of the suits. A minor is not precluded, on reaching majority from suing in his own name for anything that his guardian, either through ignorance, or negligence, has omitted to prosecute. *Gooroo Churn Sircar* v. *Kylash Chunder Sircar*. 3. Suth. c. r. p. 43. See *Bhyrab Audinarain Raee* v. *Ranee Bhooban Maye*. Beng. S. D. D. for 1848. p. p. 513 676. *The Rajah of Burdwan* v. *Ram Tadub Ghose*. ib. for 1850. p. 157. *Jigumony Zumnon Choudree* v. *Fuqurooden Mahommed Ashan Choudree*. ib. for 1852 p. 966. Where the guardian acts in fraud of the infant, the infant is of course not bound. See *Lalla Buneedhur* v. *Koonwar Bondesaree Dutt Singh*. 10. More's I. A. p. 455 (*a*) nor where the guardian acts *ultra vires*.(*b*) Therefore a widow, even with consent of the guardian, cannot borrow for a minor ward under the Court of Ward's Act. *Harkishwar Chauduri* v. *Ramdulal Lushkar*. 2. Sevest. p. 215. So where a father gave authority to A, the guardian of his minor son, to contract loans for him, and died, it was held that loans contracted by A, *after* the father's death, in respect of debts contracted *after* the father's death, did not bind the infant ; there being no proof that the monies were borrowed for the use of the

(*a*) Menu. Ch. VIII. 165. Yajnyawalkya. I. Dig. B. II. Ch. IV. S. II. V. 58.
(*b*) Menu. Ch. VIII. 163.

infant. *Shunker Singh and others* v. *Baboo Bishwendoyal Suboy.* 1. Wym. c. r. p. 306. s. c. 7. Suth. p. 231. But a father can by will authorize his executor, as guardian, to create valid charges on the estate for loans and advances for the maintenance &c., of his infant. *Golaub Koondwani Bubee* v. *Eskan Chunder Chowdhooree and others.* 8. Moore's I. A. p. 447.

So a purchaser of landed estate from a Hindu widow, having minor sons, is not an innocent purchaser, knowing, as he must be taken to do, that she is but a trustee for the latter, and has no power to alienate the property. *Luchoomun Singh and others* v. *Kazemally and others.* 1. Wym. c. r. p. 288. A sale of a joint family estate can only be good against a minor on proof of his having benefitted thereby. ib. An elder brother cannot sell his minor brother's share of joint family estate, though the minor's mother consents on his behalf. 2. Macn. p. 294. Nor is a minor bound by acts of alleged guardians and a goomastah the infant's father, there being no proof of the legal appointment of the guardians. *Hookum Chund Boyhasee* v. *Bench.* 1. Mor. Dig. n. s. p. 176. § 9. But a sale by an elder brother is good for maintenance of minor brothers, for their initiatory, and other ceremonies, for exequial rites of father, and discharge of his debts. ib. p. 297. 2. St. p. 205.(a) Where a guardian acts *extra vires* he renders himself personally liable. *Anonymous.* No. 1. of 1812. 1. Mad. Sel. D. p. 51. There it appeared, that the amount claimed was borrowed by the uncle, and adoptive father, of the minor Zemindar, during the time when he held the management of the Zemindaree, as his Guardian; and the Court concurred in the judgment pronounced by the Provincial Court, so far as it rejected the claim of the Plaintiff on the minor Zemindar; since, if a minor were held personally responsible, in the first instance, to the parties of whom his Guardian borrowed money, he would be utterly defenceless against claims of this nature, which might be accumulated upon him, at the pleasure of the Guardian. There could, however, be no doubt that the estate of a minor is responsible for all just debts incurred on his account; and the Guardian, having rendered full and fair accounts, would be entitled to recover any sums that might appear to have been borrowed, from necessity, and for the evident benefit of the minor. The Guardian was responsible for all claims arising out of transactions during his management, and to him, therefore, must claimants look for the satisfaction of their claims.

See. *Palanivelapa Kaundan* v. *Mannaru Naikan.* 2. Mad. H. Ct. R. p. 416. *Jowahir Singh* v. *Chundernarrain Rai and others* 3 Beng. S. D. R. p. 83. Ib. 1. Morl. Dig. p. 276. § 16. *Ootumrams and another* v. *Mt. Bhanee and another* 2. Borr. 166. Ib. 1. Morl. Dig. p. 277. § 18.

A guardian may be removed for misconduct.(b) *Subchunder Bose* v. *Gooroopersaud Bose and others.* F.

(a) Mitacshara. Ch. I. S. I. 28.
(b) Menu. Ch. VIII. 27.
Vishnu. II. Dig. B. V. Ch. VIII S. I. V. 450.
Sancha and Lechita. do. V. 451.
Bhaudayana. do. V. 452.
Kulaka Bhutta on Menu. Ch. VIII. 27.
Mit. Ch. I. S. I. 28.

Macn. p. 69. *Alimelammal* v. *Arunachellum Pillay and others.* 3. Mad. H. Ct. R. p. 69. A judge cannot call on a guardian for his accounts, and dismiss him for refusing to produce them. Such accounts can only be recovered from the guardian by a regular suit on behalf of the minor. *Nanu Bibee* v. *Khajah Surwer Hoossein.* 4. Wyman. c. r. p. 16. See acc. *In re Mirtinjai Bose.* 1. S. D. A. summary. Cases. pt. 1. p. 14. Ib. 1. Morl. Dig. n. s. p. 176. § 5. But the judge may summarily dismiss guardian for waste, neglect &c., and call for his accounts afterwards, under Act 40 of 1858. *Ram Dyal Gooze* v. *Amrithall Khamarro.* 5. Wym. c. r. p. 301. And in *Nundhoosoodhun Singh* v. *Collector of Midnapore* and others. 1. Marsh. p. 244. a manager of an infant's estate appointed by will was held to be only removable upon proof of actual malversation, or that by reason of mental incapacity, conviction of felony, or some other incapacitating cause, he has become incapable of managing the property, but not merely on the ground that another would manage the property better. There the Court said: "There is a question of nicety as to the manner in which the impugnment of the Manager's conduct should be brought forward. It has been decided by the late Sudder Court (No. 279, dated 17th September 1860) that a guardian appointed by will can only be removed by a regular suit; but it has also been decided (No. 430, dated 7th November 1861) that to remove a Manager to whom a certificate has been granted under Act XL of 1858, a regular suit will not lie, but summary application may be made under Section 21 of the Act which is the course followed in this case. There might be some question as to the summary removal of a Manager who receives his certificate in right of a will. It is clear that a regular suit for an account can be brought against such Manager, under Section 19 of the Act. As regards his removal, we would not, after the precedent quoted, now object to these proceedings under Section 21, but we think that in whatever form a suit instituted to cancel the certificate under that Section may be instituted, it must be supported by such proof of malversation and misconduct as will afford sufficient ground for removal. Looking to the nature of the title on which the certificate is held, there is a wide difference between a Manager appointed by will, or a near relative appointed in right of natural propinquity, and a mere Officer of the Court appointed Manager subject to the supervision of the Court. The two former Managers hold under Section 7, and render no accounts till their management is impugned under the provision of Section 19. The latter, appointed under Sections 10 and 12, is subject to a variety of special provisions, and is bound to render periodical accounts. As regards the grant of a certificate to a person claiming under a will, it is clear that, in the terms of Section 7, the Court has no option whatever. Hence we think that in such a case the Court cannot exercise any mere discretionary power under Section 21—the candidate not being absolutely and palpably incompetent. There will be sufficient cause for removing a Manager appointed as of

right, only when there is such entire incompetency or actual breach of trust as would justify a Court of Equity in depriving a man of the management of his own property, or a trustee of the management of a trust. The Judge cannot merely say, "I think some other person can manage better than you whom the deceased chose to appoint by his will, and, therefore, I will put him in." There must be actual delinquency or incompetency. In this case, nothing of the kind is made out. It is only alleged that the management is not so good as it might have been. The accounts have not been examined in detail, no fraud or embezzlement has been proved, and the grounds of removal are merely general and conjectural. It seems to us that as Section 19 of the Act has provided a special procedure for impugning the accounts, viz., a suit by a relative or friend, it is not regular that the Judge should, on the application of a friend, call for and go into the accounts in a summary way under Section 21. The friend challenging the accounts should first be directed to a regular suit to discover and impugn the accounts; after which he may bring a suit to prove embezzlement; and may, on that or other more directly tangible ground (as insanity or conviction of felony), apply under Section 21 for the removal of the Manager. But in this case we think that, as matter of fact, no sufficient ground for the removal of the Manager holding in right of a will has been made out, we therefore reverse the order of the Judge, with costs, and direct the reinstatement of the appellant." And see *Luckhee Prea Dossee* v. *Nobin Chunder Nag* 11. Suth. c. r. p. 370.

It is a guardian's duty to protect the infant's estate by suit; and in *Sheopesaud Jha* v. *Gungaram Jah.* 1. Wym. c. r. p. 289 such a suit to set aside alienation by adult members, was held not to be premature.

An infant may sue by guardian or next friend. 2. Macn. p. 205. 2. Str. p. p. 209. 216. 294. In re *Anand Mai* v. *Chandurayan* 3. Sev. p. 215. It is not necessary that the suit should be brought by guardian. Any friend may sue. *In re Sheeb Chunder* 1. S. D. A. Sum. Cas. pt. 2. p. 108. Ib. 1. Morl. Dig. n. s. p. 176. § 6. 7. When sued, he must appear by next friend. He may sue his guardian manager, and Court of Wards, where a ward, for waste, mismanagement, omissions, neglect, &c. *Rajah Vissvanath Raee v. Ramlo Morpayee and others.* Beng. S. R. for 1847. p. 506. Ib. 1. Morl. Dig. n. s. p. 177. § 13. It is said that an infant cannot claim possession of his share of joint property in the hands of his brother. 2. F. Macn. p. 13. except in case of malversation. Ib. note to p. 14. It has several times been held that a suit will not lie on behalf of an infant, without proof of malversation, or allegation thereof. Thus in *Sivamiyar Pillai* v. *Chokalingum Pillai.* 1. Mad. H. C. R. p. 105 it was held that such a suit would not lie without *evidence* of malversation. So in *Nallapa Reddi* v. *Balamal* 2. Mad. H. Ct. R. p. 182 a division was upheld against an infant, there being no proof of fraud, or that undue advantage was taken of the minority, and in the absence of proof of gross

inequality in the division: and so in *Alimmalummal* v. *Arunachellum Pillai and others.* 3. Mad. H. Ct. R. p. 69 it was held that a mother could not sue on behalf of her minor son, to recover from her step son, the managing member of the family, the minor's share in the family property, except on the ground of malversation. But it is manifest that such a state of the law would not suffice to protect a minor's property, which might be severely damaged, if he were compelled to wait until acts of waste &c., had been committed; and he had no ground of action for injunction and relief on well-founded apprehension of impending danger. In the case last above quoted, it was shown that the managing member, so far from wasting, had been doing his best for the property; and in *Kamkshi Ummall* v. *Chidembara Reddi and others.* 3. Mad. H. Ct. R. p. 94, the previous cases were considered, and it was held that a suit on behalf of a minor for partition will lie, *if the interests of the minor are likely to be prejudiced by being left in the hands of the co-parceners from whom it is sought to recover it.*(a) In that case *Innes* J. said. "The Civil Judge on the authority of the *Manual of Hindu law* by Mr. Justice Strange and the decision in the special appeal cases reported in page 105 Vol. I. M. H. C. Reps., considered that there was no ground for the action, as it was not alleged by plaintiff that the infant's interests were in danger through malversation of the property by the defendants.

"In appeal it was urged on behalf of the plaintiff that, following the decisions in Special Appeal Suit 49 of 1850 reported in page 221 of the decisions of the late Sudr Court of 1851 and a decision in 1859, in which the Principle acted upon in the decision of 1850 was adhered to, the Courts will entertain suits of the nature of that now in appeal.

"I am of opinion that the judgment of the Court below should be reversed. The true rule seems to be, that a suit on behalf of a minor for partition will lie, if the interests of the minor are likely to be prejudiced by the property being left in the hands of the co-parceners, from whom it is sought to recover it. The decisions in the cases above referred to, with the exception of that in the two cases reported in the High Court Reports, obviously went upon this principle, and with respect to the decision in those latter cases, I do not think that it requires to be distinguished from those just referred to. The *ratio decidendi* of the cases in the High Court Reports seems to me to have been, that the interests of the infant were not found to be prejudiced in any way by the property remaining in the defendant's hands. It is true that the words actually used go further and, if taken strictly, would justify the view of the Civil Judge. But the former decisions in 1850 and 1859 show that the Sudr. Court, which was then presided over by Mr. Justice Strange, did not at that date hold the narrow doctrine of the dictum in the subsequent High Court cases. Mr. Justice Strange was the presiding Judge of the Bench of Judges which decided these latter cases,

(a) Sancha and Lechita. Smriti Chandrika. Ch. I. 18. and Vide a p. 125.

and nothing is intimated in the judgment in these cases of any change of view since the decisions in 1850 and 1859. There would therefore seem to be no reason for concluding that the Court intended to go beyond the principles of former decisions.

It is scarcely necessary to say that there is no foundation in Hindu Law for the position, that an infant cannot claim partition except when there is malversation of the property in the hands of the co-parceners. An action will not indeed lie, unless there is something clearly indicating that the interests of the infant will be advanced by partition, because, ordinarily speaking the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed among the several parceners, an as a general rule, therefore, it is more profitable for an infant parcener, that his share should continue an integral portion of the whole estate in the hands of kinsmen. In the present case it is clear from the conduct of the first defendant before the commencement of the suit, in setting up a sole title to the property both in his application for a certificate under Act XXVII of 1860 and in the suits which he instituted in the District Munsif's Court, that he has assumed a position adverse to the interests of the infant. And certainly his conduct in the present suit is in confirmation of this view, were any confirmation needed. Bringing forward as he does, a will which, if genuine and otherwise valid, is inconsistent with the existence of any rights in the infant, it is impossible that the interests of the infant should be safe in his hands.

"I think therefore that the action rightly lies, and that the decision should be reserved and the suit reinstated and proceeded with upon the points in issue." and *Collett* J. said; "I am of the same opinion. The first observation is that really the Civil Judge has dismissed the suit on a ground of objection, which, so far as appears, was not put forward by any of the defendants. The objection taken is that, in order to justify a suit for partition on behalf of a minor, it must be alleged and shown that the defendants have been guilty of malversation or waste of the joint-property, in which the infant is a co-parcener, and that there is in this suit no allegation of malverstaion. A decision of this Court reported in 1 Madras High Court Reports, 105, and a section from Mr. Justice Strange's *Manual* were relied on in support of this proposition. As to the case cited, it is very shortly reported and the facts do not appear, it may have been that there was nothing to show in that case that the minor was in any way interested in obtaining a partition, and the only ground that could be suggested was Malversation, and that had neither been sufficiently alleged nor proved. The plaint in the present case does set out facts, which, if true, go to show that the minor's interest (if he has any) might be exposed to risk if the suit were not now brought. As to the section from the *Manual*, it purports to be founded on 1 Strange's *Hindu Law*, 206, but on turning to that authority, it is quite clear that waste by the

co-parceners of the joint property is mentioned not as the sole occasion, but as an instance, when it may be for the benefit of a minor that a suit should be brought on his behalf for partition, and when consequently it will be justifiable. So again, in 2 Strange's *Hindu Law*, 360, we have the opinion of Colebrooke that nothing has been found in the law to prohibit the demand of a partition when for the benefit of a minor. So that as we might expect, the benefit of the minor is what justifies such a suit. So also from the texts and commentary in 3 *Digest*, 544, it is clear that the rule is, that a partition during the minority of a co-parcener cannot take place to the damage of his interests, but the motive is the protection of his interests and consequently if it is in fact, as it may very well be, greatly for his benefit and for the protection of his interests that there should be a partition, a suit on his behalf may be brought. It would of course be most unreasonable to say that waste is the only possible way in which his interests can be endangered."

In *Kanukurty Cinna Narasinga Row and another* v. *K. Vencataramdoss Puntaloo and others.* 4. Mad. Jur. p. 251. The Court delivered the following Judgment: "This was a suit by an infant for the purpose of setting aside certain sales of family property, under which the plaintiff's father, the 1st defendant, had delivered over the property sold to the 2nd and 3rd defendants. The plaint prayed for possession of the part so sold, and for an order to restrain the defendant from any alienation of the rest of the family property. On the hearing before the Civil Judge, the plaintiff's pleader admitted that the 1st defendant had not alienated more than his own share of the undivided estate; and thereupon the Civil Judge dismissed the suit. On appeal from that decree, we were of opinion that it was necessary to ascertain whether the property of the infant plaintiff was in danger of being wasted, unless the 1st defendant were restrained from further alienation of the family property; and we therefore sent down an issue to be tried by the Civil Judge. The case now comes before us upon the Judge's finding on that issue, which is in these terms: "I am of opinion that it has not been shown there is any necessity for the interference of the Court in the minor plaintiff's behalf, and I therefore return a negative finding on the issue referred for trial." It appears that the 1st defendant is in goal under a sentence of seven years' rigorous imprisonment for an offence under section 314 of the Penal Code, that he has executed a Muktiarnamah under which monthly payments are being made to the extent of 64-3-6 and 17 putties of paddy out of an income which the Civil Judge estimates at 3,000 Rs. a year. We infer from the statement of the evidence that these payments are made for the benefit of his mistress and 5 illegitimate children, to whom he had been in the habit previously of paying 40 Rupees a month, though he made no allowance to his legitimate son, the infant plaintiff. Under these circumstances, and seeing that the 1st

defendant has already confessedly alienated the family property to the extent of about one-half, and that his own estimate of his income in the written statement puts it at 1000 Rs. only, we are quite unable to agree with the Civil Judge that the minor's estate is in no danger of being wasted unless the 1st defendant be restrained from further alienation."

On a division, the minor's share should be set apart and secured. 2 Str. 295.

A guardian has a right to the custody of the infant. In *re Culloor Narrainsamy* (Sep. 1858) Sir *C. Rawlinson* C. J. and Sir *H. Davidson* J. directed that a Hindu youth of the age of 14, who had gone to the Scottish Missionaries should be given up to his father, though he had become a convert to Christianity, and was most anxious to remain with his new protectors. See Mayne's Ind. Penal Code: note to section 361. In The *Queen* v. *Ogilvie* Tayl. p. 137. Ib. 1. Morl. Dig. 2. s. p. 177. Habeas Corpus § 1. it was held that an infant of 14 might go wherever he pleased. There the Court said: "It appears to us, on the authorities, that we must leave him (the infant) in the state of actual freedom in which our writ found him, and that all we can do is to tell him we do not decide adversely to the father's right to the possession of his person, and the custody and care of him, but that he may now elect to go to the place whence he came, or to his father's house. As the circumstances are not fully before us, we cannot say positively that the father's right is not in any way abridged, but nothing is shewn to us to lead us to the conclusion that it has suffered any diminution." Mr. Clarke, in the argument in this case, referred to *Brejonath Bose's* case, which has not been reported, and which was heard eight or ten years previously before Ryan, C. J. and Grant and Malkin, Js. The boy in that case was admitted to be past fourteen years old, and he had voluntarily gone to the Missionaries. He protested against being delivered up to his family, and declared he was a Christian, and that his family would kill him. He clung to the table of the Court-house and screamed violently; but the Court decided that they were precluded from interfering with the rights of a Hindu father, and desired the latter to remove him, which was effected, after considerable resistance by the son, in the presence of the Court. In the present case, however, the Court held that their decision must be governed by the case of *The King* v. *Greenhill* (4 A. & E. 624; 6 N. M. 244. 1836); and remarked, in reference to that case—"It is later, in fact, than the case decided in this Court; and, on the construction of the writ of *Habeas Corpus* we are bound to follow the decisions of the Courts of England in preference to any of this Court; if there were indeed any conflict between them. The case in this Court seems to have been decided in a great degree on its special circumstances, and we cannot collect from it that the learned Judges who decided it meant to say that minority simply was the only test."

In several cases which came before Sir *William Burton* in the Madras Supreme Court, he

permitted infants the liberty of choice, on the principle that though not of age they had sufficient discretion to elect. The first of these was the case of *Ragavooloo*, a native convert, who was brought up on *Habeas Corpus*, in *Regina* v. *Anderson*. It is reported in full in the 5th Vol. of the *Madras Native Christian Herald* p. 397. There was a conflict of evidence as to the age of the boy, whether he was under or over fourteen. Sir *W. Burton* submitted him in open Court to an examination, in which the Christian element largely entered, and on the boy's declaring he preferred returning to the Missionaries rather than go to his father, he was conveyed by the Sheriff to the Missionary School. See also the case of *Mooneatha*, reported in the 6th Vol. of The M. N. C. *Herald*, p. 193. also on *Habeas Corpus*. The case first came on before Sir *W. Burton*, but was determined by the full Court, Sir *E. Gambier* C. J. and Sir *W. Burton*. Here again, the test of *discretion*, not *years* was applied. The girl was examined. Here again too, was a conflict as to age, the Missionaries asserting that the girl was 12, the parents that she was only 7 or 8. She elected to go to the Missionaries; and she went. Opposed to these cases is the subsequent one in the *Madras Court* already noticed, in which a boy of 14 was given up to his father, the test of *age*, not that of *discretion* being applied. The same rule has been followed in the Bombay Supreme Court; and in event of the question arising again, it is apprehended that it will be sustained as the sounder principle of the two. In *Reg* v. *Sharpuzi Bezonji and another*. Perry's O. C. p. 91. where a Parsi family detained an infant from its father, on the ground of the latter having embraced the Christian religion, the Court ordered the child to be given up to its father. The Case was heard before Sir *Henry Roper* C. J. and Sir *E. Perry* J. In *Reg.* v. *Rev. Robert Nisbett*, the same Judges ordered a Hindu boy of the age of 12 years to be delivered up to his father, and refused to examine the boy as to his capacity and knowledge of the Christian religion, or as to his wishes to remain with Christian instructors. In the Calcutta Supreme Court two cases have been decided in conformity with the decisions in Madras: although not on the same reasons; one, in *Reg.* v. *Dr. Duff*; and again in a case in 1847. There, as I gather in the absence of Reports, the Court refused *on Habeas Corpus*, to compel the boys to return to their parents, as they were not in *illegal* restraint; and held that that if a father wished, under such circumstances, to recover his child, he must file a Bill in Equity. Sir *Erskine Perry* submitted his decision to one of the most eminent judges on the English Bench, (*Patterson* J., it is believed: see 26. Law. J. Q. B. p. 174) whose opinion is as follows: —"I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of *habeas corpus*. The general law is clearly so, and even after the age of fourteen, whereas this boy (Shrìpat) was only twelve. The right may indeed be

forfeited by misconduct of a very gross nature, but nothing of that kind appears to have been brought forward. It may have been an act of imprudence originally in the father to place his boys with persons who were likely to bring them up in religious opinions and faith contrary to their father; I suppose he made some stipulations for avoiding this; but whether he did or not, I do not think that the law would be affected thereby. Even if he had changed his mind on that subject, as well as on the education of his boys in other respects, I know of no law which forbids him to do so, or binds him to the arrangement which he had at first made."

An infant is not liable either in person or property for the debts of his ancestor. 2. Macn. p. 287. 2. Str. p. p. 206. 207. Nor can he be affected by the acts of his adult family. Therefore, in *M. Golat Khanwur and others* v. *The Collector of Benares and Rajah Oodat Narrain Sing.* 4. Moore's I. A. p. 246. it was held that where an estate had been confiscated by Government on account of the rebellion of three brothers, the fourth, a minor, not concerned in the rebellion, was entitled to retain his share in all the ancestral estate taken by Government under the forfeiture.

GOPEEKRIST GOSAIN V. GUNGAPERSAUD GOSAIN.

6 MOORE'S INDIAN APPEAL PAGE 53.

GOPEEKRIST GOSAIN...*(Appellant)*

AND

GUNGAPERSAUD GOSAIN...*(Respondent*)*

On appeal from the Supreme Court at Calcutta.

The presumption of the Hindoo law, in a joint undivided family, is, that the whole property of the family is joint estate, and the onus lies upon a party claiming any part of such property as his separate estate, to establish that fact.

Where a purchase of real estate is made by a Hindoo in the name of one of his sons, the presumption of the Hindoo law is in favour of its being a benamee purchase, and the burthen of proof lies on the party in whose name it was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate.

Purchase of a talook in Bengal by a Hindoo in his eldest son's name, the conveyance, though in the English form of lease and release, held to be a benamee purchase, and the son in whose name it was purchased declared to be a trustee for the father, and the talook part of the father's estate.

In reversing the judgment of the Court below, the Judicial Committee remitted the cause with certain directions, leaving the question of the allowance of costs in the discretion of the Court below.

The Appellant and Respondent in this case were brothers, and joint heirs by the Hindoo law of their deceased father, *Ragoram Gosain*. The question raised by the suit in the Court below and by the present appeal was, whether a *talook* called *Gheritty*, situate in the dis-

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Patteson.

trict of *Hoogly*, in *Bengal*, which was purchased by *Rogoram Gosain* many years before his death, and previously to the birth of the Appellant, in the name of the Respondent, did or did not, at the time of his death, form part of the real estate of *Rogoram Gosain*, so as to pass to the Appellant and Respondent jointly under a general devise to them contained in his Will, or descended to them as joint heirs in case of intestacy. The case of the Appellant was, that the *talook* formed part of his father's real estate. The Respondent, on the contrary, insisted, that it was his separate property, having been bought by his father in his name, for his separate use and benefit.

The circumstances giving rise to this question were as follows :—

Rogoram Gosain, a Hindoo, of considerable property, was, up to the year 1831, jointly possessed with his brother, *Ruggubram Gosain*, of property derived from their father; of which a partition was in that year effected, and his share of the property ascertained. In the year 1825, *Rogoram Gosain* purchased, for the sum of Rs. 64,000, the *talook* in question. The receipt for the purchase-money and the conveyance was taken in the name of the Respondent, who was then his only son, of the age of two years or thereabouts. The conveyance of the *talook* was in the English language and form, by lease and re-lease, dated the 12th and 13th of July, 1825, in which the Respondent was simply described as *Zemindar* of *Serampore*. As between himself and his brother, *Rogoram Gosain* debited himself with the purchase-money, but he shortly afterwards opened an account in his private books with the Respondent, and therein debited the Respondent with the purchase-money, and credited him from time to time with the rents of the *talook*; this account was continued down to the time of the death of *Rogoram Gosain*.

In the year 1832, subsequently to the birth of the Appellant, and after the partition between *Rogoram Gosain and Ruggubram Gosain* had been effected, *Rogoram Gosain* bought another *talook*, called *Chattra*, the conveyance of which was taken in the name of the Appellant, and *Rogoram Gosain* debited the Appellant in another account, which he opened in his books in the Appellant's name, with the purchase-money of this *talook*, and credited him in the account, from time to time, with the rents, in like manner as he did in the account in respect of *Gheritty* with regard to the Respondent. This account was also continued down to the time of the death of *Rogoram Go-*

sain. He also made other purchases of land in the name of other members of his family.

Rogoram Gosain died in the year 1842, having executed an instrument purporting to be a Will, dated the 5th of *November*, 1841; by which he bequeathed the whole of his property, real and personal, whether *Zemindary*, or rent-free tenure, houses, Company's papers and other obligations, bonds, notes, &c., due to him, to his sons, *Gungapersaud Gosain* and *Gopeekrist Gosain*, in equal shares; and he gave also certain pecuniary legacies to his four daughters and their issue.

As this instrument contained no appointment of executors, the Appellant and Respondent did not consider it as a Will, and they accordingly, after taking the usual legal proceedings, were admitted to be the heirs and representatives of *Rogoram Gosain*; and acted as such, treating the instrument as of no effect as a Will. The rents of the two *talooks*, *Gheritty* and *Chattra*, were, after the death of *Rogoram Gosain*, generally received on the joint receipt of the Appellant and Respondent; but the rents of *Gheritty* were carried in the joint books of the Appellant and Respondent to the credit of the Respondent.

In the year 1848, the Appellant, for the first time, set up a claim to have *Gheritty* treated as forming part of the real estate of *Rogoram Gosain*, and as such belonging to the Appellant and the Respondent jointly. The Respondent refused to recognise this claim, and insisted that *Gheritty* was his own separate property, being purchased in his name.

The Appellant took proceedings before the Magistrate of *Serampore* for the purpose of enforcing his right to a joint possession with the Respondent of *Gheritty*, but the Magistrate decided in favour of the Respondent. The Apppellant then appealed to the Sessions Judge, who reversed the decision of the Magistrate, and directed that both the Appellant and Respondent should be put in possession of *Gheritty*. In consequence thereof, the Respondent, in *May*, 1849, brought an action of ejectment in the Supreme Court at *Calcutta*, on the plea side of the Court, against the Appellant, for the purpose of recovering possession of *Gheritty*, and the cause stood for trial, when the Appellant, on the 18th of *July*, 1849, brought the present suit on the equity side of the Supreme Court against the Respondent. The bill stated, that it was customary for Hindoos of property to purchase various parcels of real estate in the names of their different sons,

but without any intention whatever of giving to such sons whose names were so used, the sole beneficial estate or interest therein, or any other beneficial estate or interest therein than what the son would or might ultimately take in the rest of the estate and property upon the father's death. That *Rogoram Gosain* took the two conveyances in the names of the Appellant and Respondent respectively, in conformity with such custom, and without any intention whatever of altering the succession thereto; and that he intended that the Appellant and Respondent should hold the *talooks* respectively upon the same trusts and to the same uses as the rest of his estate and property. That in devising to the Appellant and Respondent jointly all his estate and property, he included and meant to include therein both of the *talooks*, as the Appellant had always admitted with respect to *Chattra*. That in the year 1825, when *Rogoram Gosain* so purchased *Gheritty*, he was joint with his brother, *Ruggubram Gosain*, as to a certain ancestorial real property, and that his object in taking the same in the Respondent's name was to keep it separate from the joint ancestral estate in which *Ruggubram Gosain* was interested, and under colour of which *Ruggubram Gosain* set up a claim or joinder on the whole estate of *Rogoram Gosain*. That *Rogoram Gosain* purchased *Chattra* in the Appellant's name, because he at the time was alleged to be involved in the *Calcutta* Bank, in partnership with the late firm of *Palmer* & Co., which had failed in business. The bill then contained various allegations relative to the manner in which *Rogoram Gosain* and the Respondent and Appellant respectively had at different times acted in reference to *Gheritty* and *Chattra*; and after stating the legal proceedings which had taken place between the Appellant and Respondent, and the action of ejectment brought by the Respondent, prayed that the *talooks* of *Gheritty* and *Chattra* might be declared and decreed to have been parcels respectively of the real estate of *Gogoram Gosain*, deceased, and to have passed under the general devise in his Will to the Appellant and Respondent as joint devisees thereof; and that the Respondent might be declared to be a trustee for himself and the Appellant jointly, in respect of the *Gheritty talook* and premises, and might be decreed to execute such conveyance or other deed in respect thereof as might be necessary to secure to the Appellant his right and interest as such devisee as aforesaid in a moiety thereof; and that he might be restrained from further prosecuting the action of ejectment, and from commencing or proceeding with any other action of ejectment, in respect of the *talook* and premises, against the Appellant, either in that Court, or

in the *Mofussil* Courts or doing any other act to oust the Appellant, or to obtain exclusive possession of the *talook* and premises, or to prevent the Appellant from receiving his moiety of the rents and profits thereof.

Judgment in the action of ejectment was obtained by the Appellant, but execution was stayed pending the suit in Equity.

The Respondent, by his answer, admitted the death of *Rogoram Gosain*, and that in his life-time he signed the instrument in writing, dated the 5th of *November*, 1841, as before-mentioned; and submitted to the Court the effect of such instrument, and whether the Appellant and Respondent were thereby constituted executors. The answer also admitted the purchase of *Gheritty*, and that the conveyance was by lease and release to and in the name of the Respondent, but not as the eldest son, and then the only son, of *Rogoram Gosain*, he being described in the deeds respectively simply as *Zemindar*. And the Respondent, by his answer, further admitted that *Rogoram Gosain* was at that time joint with his brother as to certain ancestral real estate, but denied that at the time of such purchase, *Rogoram Gosain* had a dispute with his brother, *Ruggubram Gosain*, as in the bill mentioned, or that there was any dispute between them as to their joint estate previous to the year 1828. And he admitted that *Rogoram Gosain* debited his own account in in the joint books of himself and brother with the purchase money, but under the head of *Gungapersaud Gosain*, as a transaction of *Rogoram Gosain*, by way of temporary loan to the Respondent; that, after separation from his brother thereinafter mentioned, he transferred the purchase-money to separate accounts, which he opened under the separate head of the Respondent, who was debited therewith; and that in the year 1832, having previously in the year 1831, effected partition between himself and his brother, he debited another account, which he opened in his own separate books, under the head of the Appellant, with the purchase-money of the other *talook*, called *Chattra*; and the Respondent denied that *Rogoram Gosain* bought the same in the name of the Appellant, but as *benamee* merely, and by his answer he further stated that *Rogoram Gosain* bought the same for the separate use and benefit of the Appellant in the same manner as he bought the *Talook* of *Gheritty*, in the name and for the separate use and benefit of the Respondent. He also admitted that it was sometimes done, but denied that it was customary, for Hindoos of property to purchase various parcels of real estate in the names of different sons, but insisted that

such practice was without any intention whatever of giving to such sons whose names were so used, the sole beneficial estate or interest therein, or any other beneficial estate or interest therein than what the son would or might ultimately take in the rest of the estate and property upon the father's death; and the Respondent denied that *Rogoram Gosain* took the two conveyances respectively, in the names of the Appellant and Respondent respectively, in conformity with such alleged custom or any custom, or without any intention whatever of altering the succession thereto, or that he did, from the time of the purchase thereof up to his death, hold and enjoy the *talook of Gheritty* as part of his real estate, but stated that *Rogoram Gosain*, as the father and natural guardian of the Respondent till he was of proper age to act for himself, held the *talook*, and collected and received, and at his pleasure disposed of, the rents and profits thereof. And the Respondent denied that *Rogoram Gosain* intended that the Respondent and Appellant should respectively hold the *talooks* upon the same trusts and to the same uses as the rest of his estate and property; or that in devising, by the beforementioned instrument (if any devise were therein contained), jointly all his estate and property, he included or meant to include therein both the *talooks*; or that the Appellant had admitted the same as regarded *Chattra*, save that when he found the same was not quite so valuable as the *talook* of *Gheritty*, by circumstances that happened after the purchase, he then set up the case made by the bill. And the Respondent denied that he and the Appellant had always held the *talook* of *Chattra* jointly; and stated that since the beginning of the Bengally year 1255 (A. D. 1848), the Appellant had received and expended the rents and profits, and entered the same in his separate books of account which he had kept since the last-mentioned period.

Both parties entered into evidence relative to the purchase of the *talooks* of *Gheritty* and *Chattra*; and also relative to the manner in which the accounts of the purchase-moneys and of the rents of the two *talooks* were kept, both during the life-time of *Rogoram Gosain* and subsequently to his death. The effect of this evidence is fully considered and commented upon in the judgment.

The cause was heard by the Supreme Court on the 1st, 2nd, and 3rd days of *August*, 1850; and on the 13th of *September* in the same year judgment was delivered by Mr. Justice *Colvile*, sitting for the Chief Justice, the material part of which was as follows:—

"The question in this cause is, whether a certain *talook*, purchased by *Rogoram Gosain* many years before his death, in the name of one of his sons, became the property of that son, or is to pass under a general devise of his estate to his two sons in equal shares. If the question had arisen between British subjects, the principles on which it would have to be decided are clearly defined, and not difficult of application. In ordinary cases, if an estate be purchased in the name of one, but by and with the money of another, there arises, by a presumption of law, a resulting trust in favour of that other. In the exceptional case, wherein the person who thus employs his money stands in the relation of parent to him in whose name the purchase is made, the law presumes an advancement, and the resulting trust does not arise. This presumption of advancement is, however, capable of being rebutted by evidence, showing that the real intention of the parent was, that the purchase should enure for his benefit, and that the child should take only as trustee. Declarations by the parent, if contemporaneous with the purchase, are admissible to prove such an intention, but declarations subsequent are rejected. The reason of this distinction is obvious. A contemporaneous declaration is an indication of a present intention; a subsequent declaration is, at most, evidence of what a former intention was, and as such can rank no higher than any other declaration, which, unless against the interest of the party making it, is excluded by the known rules of evidence from judicial consideration. These principles and distinctions are established and enforced by a long course of decisions beginning with *Grey* v. *Grey* (Cases temp. *Finch* 338); and going down to more recent cases, before the Vice-Chancellor *Knight Bruce*, the more leading authorities are *Taylor* v. *Taylor* (1 Atk. 386); *Dyer* v. *Dyer* (2 Cox, 92); *Murless* v. *Franklin* (1 Swanst. 13); *Crabb* v. *Crabb* (1 Myl. & K. 519); and *Sidmouth* v. *Sidmouth* (2 Beav. 447). This case, however, arises between Hindoos, and is one which the Hindoo law, so far as it is distinguishable from the English law, must govern. '*Benamee* transactions' are common amongst Hindoos; but I am not aware that there is any authority for applying to them the doctrine of resulting trust, as a presumption of law. On the other hand, the presumption of advancement does not necessarily arise upon a purchase by a father in the name of his son. There seems, then to be nothing in the Hindoo law which is contrary to either the Plaintiff's or the Defendant's view of this case. And the Court must determine the case upon its own conviction, deduced from the evidence of what the intention of *Rogoram Gosain* in this

particular transaction was. We ought not, however, in dealing with this question, entirely to leave out of consideration the decisions of the English Courts, because, although the presumptions which I have mentioned are not to be applied as legal presumptions, the process of reasoning on which they are founded, so far as it rests on experience, or observation of the ordinary principles of human action, and is not repugnant to any of the peculiarities of Hindoo faith or customs, may, most legitimately and usefully, be applied to the constructiou of ambiguous acts, and to the deduction of a particular intention from them; and further, because in determining what is and what is not admissible to prove intention, we must in this, as in every other case, follow the English law of evidence.

"Now, although several witnesses have been examined, and a large mass of documentary evidence has been put in on both sides, we cannot say that the evidence on the one side or the other is conclusive upon the question of intention. A great portion of it relates to the purchase by *Rogoram Gosain*, in 1832, of another *talook* called *Chattra*, in the name of his younger son, the Plaintiff; but since it is admitted that his intention (whatever it was), with respect to the purchase of *Gheritty* in the name of the elder son, was the same with the intention afterwards manifested by him in the purchase of *Chattra* in the name of the younger son, this portion of the evidence ought, equally with the rest, to receive the careful consideration of the Court. Again, the evidence is divisible into proof of things done by *Rogoram* and his sons in the life-time of the former, and proof of things done by the sons after their father's death. The effect of these two classes of proofs it will be convenient to consider separately.

"The evidence shows that *Gheritty* was purchased when *Rogoram* was joint in estate with his brother *Rugubram*. The conveyance is in the English form of lease and re-lease, and direct from the vendor to the Defendant, *Gungapersaud* (then an infant). There can, therefore, be no doubt, that at law, the estate became vested in possession in the Defendant. There are, besides, some entries in the books of the charges for setting up a bamboo, which, it may be presumed, is some symbolical mode of taking possession. But this, considering the nature of the conveyance, could only import a possession taken in the name and on account of *Gungapersaud*, the nominal purchaser.

"There is no satisfactory evidence of any parol contemporaneous declaration by *Rogoram*, of his intention in respect of this purchase, whether it was to be for his own or for his son's benefit. *Rustomjee Cowasjee* says, generally, that he recollects the purchase; that it was in the name of the son; that *Rogoram* told him he bought it in the name of his son. Assuming this communication to have been contemporary with the purchase, it is ambiguous as respects the point in dispute. The conversations deposed to by *Goberdone Sain*, and the cashier in the official assignee's office, appear to have been conversations subsequent to the event, and they are hardly more conclusive of the question of intention than that deposed to by *Rustomjee Cowasjee*.

"The books seem to show that upon the purchase *Rogoram* debited himself in the joint books, as between himself and *Ruggubram*, with the purchase-money of the estate, Rs. 64,000; and that he then, or shortly afterwards, opened an account between himself and his son, *Gungapersaud*, in which he debited his son with the principal purchase-money, and credited him with the net rents of the *talook*. This account, so opened, seems to have been continued on that footing, in one or other of the books, up to the time of *Rogoram's* death.

"It is further proved, that long after the purchase, in 1838 and 1839, upon an attempt being made to assess the *Lakhiraj* lands of *Gheritty* for Government revenue, *Rogoram Gosain*, in his memorials to the Deputy Collector, and to the then Deputy-Governor of *Bengal*, treated this *talook* as the property of his son, and that he also so treated it in a letter to Mr. *Storm*, who rented part of the estate.

"As to the general management of the estate during the life of *Rogoram Gosain*, the evidence, I think, pretty conclusively shows, that the ostensible ownership was in the son, that the estate stood in his name in the Collector's books, that leases were granted, and receipts for rent given to the tenants and *Ryots*, also in his name; but on the other hand, that the rents when collected were received by *Rogoram Gosain*, and the receipts for those collections given in his name; and that with the concurrence of the Defendant after he attained his majority. The books, however, show that the rents so received by *Rogoram* were duly carried to the account I have mentioned, —the account wherein the Defendant was credited with those rents, and debited with the principal purchase-money.

"The general management of *Chattra* appears to have been the same as that of *Gheritty*. There is, however, this further evidence as to the original purchase of *Chattra*, namely, that if the witness, *Hurrochunder Lahoree*, is believed, *Rogoram* expressed, at the time of that purchase, an intention to purchase for the benefit of his younger son, what he probably conceived would be equal in value to the purchase already made for the benefit of his elder son. The conversation spoken to by *Rustomjee Cowasjee*, which would imply an intention on the part of *Rogoram* to purchase *Chattra* in the name of the younger son, in order to prevent its falling into and becoming part of the estate wherein he was joint with *Ruggubram* evidently relates, not to the actual purchase of *Chattra*, which was after the separation in estate of *Rogoram* and his brother's representatives, but to a former and ineffectual treaty for that purchase.

"The Plaintiff relies strongly on evidence of other purchases in the name of the Defendant, which are admitted to be part of the joint estate that passed by the Will of *Rogoram*, and upon one particular book, called the abstract account book of the estate of *Rogoram Gosain*, in which the rents of *Gheritty* and *Chattra* are entered with those of estates admitted to be the property of *Rogoram*.

"As to the first, the Defendant's answer is, and the books seem to support this view, that *Rogoram Gosain*, whether he had or had not any right so to do, did make a transfer to himself of other properties, particularly of the house in *Calcutta*, which he had purchased in the name of the Defendant, but that he did not so transfer the *talook*, *Gheritty*; but, on the contrary, continued up to the time of his death, to make a distinction between that and the transferred property, crediting the defendant with the rents, and debiting him with the principal purchase-money of the estate.

"As to the second, it is to be observed, that the book itself is of so late a date as 1837, and, therefore, the declaration, if one is to be implied from the ambiguous entry of the rents of these estates in such a book, that the beneficial interest in the estates was in the father, would not be admissible in evidence against the son. But if this be the meaning of these entries, it is difficult to reconcile them with the Exhibits, Nos. 11 and 12, proved by the Defendant, which show that at that time, and up to a later date, he continued to credit his sons respectively with the rents of *Gheritty* and *Chattra*.

"Upon the whole, therefore, the case would seem to stand thus:—the legal estate in *Gheritty*, and the ostensible ownership of it, were clearly vested in the Defendant. They were never vested in his father. The purchase was made by the father in the name of an infant son of tender years. Without applying the English doctrine of advancement, we may fairly consider an intention to benefit a son as *Primâ facie* more probable than a like intention in favour of a stranger in blood; and we may treat the age of the nominal purchaser as a circumstance contradictory of an intention on the part of the father to reserve the dominion over the estate to himself, or to make a trustee of one incapable of executing a trust. It is also more reasonable to suppose, that the intention was to provide for the son by a purchase made with money borrowed by the father from the joint estate, than to suppose that he intended to create a secret trust in favour of himself in fraud of the brother with whom he was thus joint in estate. As to any declared intention, the evidence, unsatisfactory at best, seems to us to preponderate in favour of the Defendant. The perception of rents by the father in his life-time is not inconsistent with the Defendant's claim. The reasoning of Lord *Langdale*, in *Sidmouth* v. *Sidmouth* (2 Beav. 457), concerning the receipt of the dividends by Lord *Stowell*, applies even more strongly to the case of an Hindoo parent and child living together as members of a joint-family; the *patria potestas*, and the respect paid to the head of the family, being certainly at least as strong amongst Hindoos as amongst Englishmen. In this case, moreover, the receipt of the rents is fully explained by the manner in which they were dealt with, in being carried to the credit of his son, and set against the principal sum which the father obviously intended to be repaid to his estate. On other matters relied upon by the Plaintiff, we have already incidentally remarked. Upon the whole, therefore, we should have thought, had this case been submitted to the Court immediately after *Rogoram's* death, that the Plaintiff had failed to show, that the *Gheritty talook* was to be treated as part of the estate over which the Testator had a disposing power."

The Court further held that the Will raised no case of election as to these estates, and that, upon the whole case, the Plaintiff failed to show any sufficient ground why the Court should interfere with, or disturb, the legal title of this estate; and that the bill, being limited to that object, ought to be dismissed, without costs.

Against the decree made pursuant to this judgment, the present appeal was brought.

Mr. *R. Palmer*, Q. C., Mr. *Leath*, and Mr. *Maude*, for the Appellant:

The decree cannot stand. The Court founded its judgment on an assumption, that in the case of a purchase made by a father in the name of his son, the *onus* of proof that he was trustee only, rested on the Appellant; and dealt with the case as if he was bound to prove a joinder in estate in respect to this *talook*. On authority and principle, that was an erroneous view of the burthen of proof. Here the parties are brothers, and if the Court went on the English rule as to a purchase by a father for the benefit of a child, it was wrong, the legal presumption being clearly in favour of the children where there are more than one child. It was a *benamee* transaction, very common in *India*, a purchase by the father in another's name, for his own benefit, and the validity of such a transaction is recognised by the Hindoo law and custom in *Bengal*. *Amanee Dewaree* v. *Rai Rughoo Bun Suhai* (*a*), *Doe dem. Tilluck seal* v. *Gour Hurry Day* (*b*), *Maha Ranee Bussunt Comaree* v. *Bullobded* (*c*).—[The Lord Justice *Knight Bruce*: Is it your contention that a purchase by a father in name of son is in Hindoo law the same as a purchase by one person in the name of another is by the English law, so as to raise the question of a resulting trust?]—Yes. And we submit that the Respondent was bound to prove the contrary, and to establish that he had the sole separate beneficial interest in the *talook*. It is a very strong circumstance, that at the time of this purchase, *Rogoram Gosain* and his brother constituted a joint undivided family, and that any property they might have was joint estate. The presumption of the Hindoo law is, that the whole of the property of an undivided family belongs to the common stock, *Luximon Row Sudasew* v. *Mullar Row Bajee* (*d*), *Dhurm Das Pandey* v. *Mussumat Shamu Soondri Dibiah* (*e*), *Gour Chunder Rai* v. *Hurish Chunder Rai* (*f*); and it probably was for that very reason that it was necessary to purchase this *talook* as "*benamee*," to avoid disputes. The mere fact of entries in the books, of the profits of the *talook* which *Rogoram Gosain* debits himself with, prove nothing as to the sole beneficial interest of the Respondent.—[The Lord Justice *Knight Bruce*: It is admitted that the father received the rents: this by the English law would make no difference, but by the Hindoo law it may be different. There is no evidence during the father's life of any enjoyment of the

(*a*) 3 Ben. Sud. Dew. Rep. 363.
(*b*) Fulton's Rep. 313.
(*c*) Morton's Dec. 249.
(*d*) 2 Knapp's P. C. Cases, 60.
(*e*) 8 Moore's Ind. App. Cases, 229, 240.
(*f*) 4 Ben. Sud. Dew. Rep. 162.

profits by the Respondent.]—It was a [*benamee* transaction, and cannot defeat the right of the Appellant, either as devisee with his brother under the Will, or in case of intestacy, as having devolved upon them by the Hindoo law, as joint heirs and representatives. The same principle relating to a purchase in another's name is recognised by the Mahomedan law, called by that law "*furzee*," or fictitious name, *Sheikh Bahauder Ali* v. *Sheikh Dhomun*(*a*).

Mr. *Rolt*, Q. C., Mr. *Dickens*, and Mr. *A. Gordon*, for the Respondent.

The question is purely one of fact, and not of law. In such a case, therefore, the Court below is the best judge of the value of the testimony, and this Court will not reverse a judgment founded upon facts only, unless the conclusion of the Court be palpably wrong. This is a simple purchase by a father in the name of his son. The conveyance is in the English form of lease and re-lease, and direct from the vendor to the Respondent; a fact of considerable importance, as no case of "*benamee*" can be referred to where the conveyance was by lease and re-lease. The evidence in the cause shows that the father intended and gave the Respondent by such deed the sole beneficial estate and interest in this *talook*. The entries in the books are strong proof of intention. It is a debtor and creditor account, the Respondent being credited with the profits. The fact of the father remaining in possession and receiving the rents is satisfactorily accounted for, as the Respondent was a minor. Whether the case be tried by the Hindoo or English law, the judgment appealed from is, we apprehend, correct. Such a gift was lawful by the Hindoo law, 2 *W. H. Macnaghten's* "Principles of Hindu Law," pp. 243. 244. 250. But the fact of the conveyance being in the English form, shows that the father wished the English law to be applied to the case; if so, as the purchase is by the father in the name of his son, the presumption of advancement necessarily prevails, and the doctrine of resulting trusts does not arise: the English authorities, therefore, apply, *Grey* v. *Grey* (*b*), *Ebrand* v. *Dancer* (*c*); *Elliot* v. *Elliot*(*d*), *Mumma* v. *Mumma*(*e*) *Stileman* v. *Ashdown*.(*f*), *Dyer* v. *Dyer*(*g*) *Lamplug*(*h*) v. *Lamplugh* (*h*).—[The Lord Justice *Knight Bruce*: In *Murless* v. *Franklin* (*i*), the Court held that to rebut the presumption of advancement, evidence of the father's

(*a*) 1 Ben. Sud. Dew. Rep. 250.
(*b*) 1 Cha. Ca. 296; S. C. Finch, 338.
(*c*) 2 Cha. Ca. 26.
(*d*) 2 Cha. Ca. 231.
(*e*) 2 Vern. 19.
(*f*) 2 Atk. 477: 480.
(*g*) 2 Cox 92.
(*h*) 1 P. Will. 111.
(*i*) 1 Swanst. 13.

intention must be contemporaneous with the purchase.]— The Appellant, on whom the burthen rested, has failed to prove that the Respondent is not solely entitled to the legal and beneficial estate in this *talook*. There never has been any agreement express or implied between them to treat the *lalook* as part of the joint estate.

The Lord Justice KNIGHT BRUCE:

"In this appeal two questions of importance arise, one of fact, material only to the particular parties to this litigation; the other of law, interesting, not only to them, but to Society at large among the natives of *India*, at least among the natives of *Bengal*. The questions arise in this way: A wealthy native of the name of *Rogoram Gosain*, employed as a *Banian*, at *Calcutta*, and having also mercantile concerns of his own, made at different periods of his life purchases of immoveable property in other names than his own; some of these purchases being made in the names of his sons, and some in the name of his son-in-law and of his brother. It is very much the habit in *India* to make purchases in the names of others, and, from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as "*Benamee* transactions;" they are noticed, at least, as early as the year 1778, in Mr. Justice *Hyde's* notes, where, in a case that came before him in that year, *Doe dem. Tilluck Seal* v. *Gour Hurry Day* (Morton's Dec. 249), the practice is thus mentioned: "In mere personal demands, such as *Bengal* bonds, the Courts have upon consideration determined that the action may be brought in the name of the person whose name is on the instrument, though it should be proved that he had no real interest in it. And the Court has so far complied with the very general practice in this country of using the names of other persons in mere personal demands, that in many cases the Plaintiff had recovered on notes not in his own name, but in some other name, giving evidence that the transaction was really his; such for instance, that the money lent was his, and that he took the Bond in the name of another." Then he speaks thus in reference to real estate: "but it cannot be allowed to be both ways; in the case of a dispute of land, without directly contradicting those former decisions of the Court."

In a much more recent case, which occurred in Sir *Edward Ryan's* time, *Maha Ranee Bussnut Comarree* v. *Bullobdeb* and others, reported in Fulton, 383, which

report Sir *Edward Ryan* informs us is substantially accurate, it is said, "As far as the evidence goes, for there was no proof of the deed, the transaction is a simply *benamee* one, in the name of the complainant, but in truth for the benefit of *Rajah Tez Chunder*. It may be for religious purposes, but the question raised, whether the Court will recognise a *benamee* trusteeship, or a trust upon a trust, does not arise. It being once established, then, that the transaction is '*benamee*,' the circumstance of the receipts being in the name of the complainant proves nothing, that being in accordance with *benamee* usages. The complainant, therefore, has no title to call for the account, and the bill must be dismissed."

Other cases were mentioned in the course of the argument, which came before the *Sudder* and other Courts, to the same effect. The law upon this subject was recognised by the Judicial Committee, in 1843, in the case of *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 229), where Lord *Campbell*, in delivering the opinion of the Court, at page 240, says, "We have heard from the highest authority, from the authority of Sir *Edward East* and Sir *Edward Ryan* (whose most valuable assistance we have in this case, and it has given me a confidence that I should not otherwise have felt), that the criterion in these cases in *India* is to consider from what source the money comes with which the purchase-money is paid. Here there has been no evidence given that the Appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid; therefore, I think, that so far on this part of the case no difficulty can be entertained, and that the whole of the property must be considered as joint property."

It is clear, and their Lordships are confirmed by the opinion of Sir *Edward Ryan*, that the knowledge and assent of the person in whose name the purchase is made is immaterial: to repeat the language of Lord *Campbell*, the criterion is, the quarter from which the money comes, and in the greater number of instances of *benamee* purchases they are made in the names of persons ignorant at the time of their being so made. In the present instance there is no question but that all the money was provided by *Rogoram Gosain*; that is indisputable. I do not allude now to whether the money was the joint property of *Rogoram Gosain* and his brother. It is clear it was not the money of the individual in whose name the purchase was effected. If then the person in whose name the purchase was

effected had been a stranger in blood, or only a distant relative, no question could have arisen; he would have been *Primâ facie* a trustee, and if he desired to contend that the *Primâ facie* character of the transaction was not its real character, the burthen would have rested on him; but the individual in whose name the present purchase was effected was the son, and at that time the only son, of the person who made the purchase, and whose money it was, and it has been contended that that circumstance changes the presumption, and that what would be the presumption in the case of a stranger does not exist between father and son; that the presumption is advancement, and that, therefore, the burthen of proof is shifted. Now, on this, as far as their Lordships can learn, there is no authority in Indian law, no distinct case, or *dictum*, establishing or recognising such a principle, or such a rule. It is clear that in the case of a stranger the presumption is in favour of its being a *benamee* transaction, that is a trust; but it is clear also that in this country, where the person in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different; and it is said that that ought to be deemed the law of *India* also, not because it is the law of *England*, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of *India*. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris*. Probable as it may be, that a man may wish to provide for his son to a certain extent, and though it may be his duty to do so, yet there are other considerations belonging to the subject; among others, a man may object to making his child independent of him in his life-time, placing him in such a position as to enable him to leave his father's house and to die, leaving infant heirs, thus putting the property out of the control of the father. Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the name of another, to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances; but in *India* there is what would make it particularly objectionable, namely, the impropriety or immorality of making an unequal division of property among children. This might be more striking where there were more sons than one; but if the objection exists, it does

not become less where there is only one son, for the father may have others, and such a case the same objectionable consequences would follow as where several sons were in being. The note on this subject is clearly stated in *W. H. Macnaghten's* "Principles of Hindu Law," which we learn from Sir *Edward Ryan* is cited as an authority in the Courts of *Bengal*. In the first volume, p. 2, he says, "The most approved conclusion appears to be, that the incohate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create this right, the incohate right which previously existed becoming perfected by the removal of the obstacle, that is, by the death of the owner (natural or civil), or his voluntary abandonment. In ancestral real property the right is always limited, and the sons, grand-sons, and great-grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of the inheritance, are declared to possess an interest in such property equal to that of the occupant himself; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another. With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility. The property of the father being thus restricted in respect of ancestral real property, and Wills and Testaments being wholly unknown to the Hindoo law, it follows, for the sake of consistency, that they must be set aside, where they are at variance with the law; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his life-time. A Will is nothing more or less than the legal declaration of a man's intentions, which he wills to be performed after his death; but willing to do that which the law has prohibited, cannot be held to be a legal declaration of a man's intentions. There may be a gift in contemplation of death, but a Will in the sense in which it is understood in the English law, is wholly unknown to the Hindoo system; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may be done *inter vivos* may not be done by Will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect, cannot, according to the law of *Bengal*, be set aside,

and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons, by preferring one or excluding another, without sufficient cause. This has been declared in *Dâyabaga* to be a precept not a positive law; and it is therein laid down, that a gift or transfer under such circumstances is not null; for a fact cannot be altered by a hundred texts. There is nothing inconsistent in this, as the doctrine is rather confirmatory of the text, which declares the absolute nature of the father's power over such property; but it has been held to extend to the legalizing of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or, in other words, to signify that an act may be legally right though morally objectionable."

It is their Lordships' opinion, therefore, that notwithstanding the Respondent was the only son of *Rogoram Gosain* when the purchase was made, the objection in point of morality and of religion was a circumstance of conduct so strong, according to Hindoo principles, that it is not lightly to be assumed; it forms an objection against importing into the Hindoo law that rule of positive law which exists in *England*. I have omitted to observe that *benamee* purchases in the names of children, without any intention of advancement, are frequent in *India*; that is recognised in many cases, and, among others, in that of *Amaree Tewaree* v. *Rai Rughoo Bun Sahai* (3 Ben. Sud. Dew. Rep. 360), where may be found this statement: "The present case does not appear to be at all of a nature with those *benamee* transactions which are prohibited by the Regulations, as *Sheo Suhai*, in making the purchase in the name of his eldest son, acted only in conformity to the general usage and custom of the country, against which the prohibitory enactment was never intended to apply."

Their Lordships are, therefore, satisfied, that according to the law by which this case must be governed, the presumption in favour of its being a *benamee* transaction

is different from that which would have existed by the law of *England*. It is, therefore, upon this point of view that their Lordships must look at the evidence, and to this text it must be submitted. In this case it is on the Respondent to prove whether what was *primâ facie* the nature of the transaction, was really not so. It might, of course, be a very different thing if the burthen of proof were the other way, and the Appellant had to show the opposite state of the case. Now, the Supreme Court, without saying it, has held that the presumption was not against the Respondent, and has certainly not held that it was in favour of the Appellant, and this is a position of law on which their Lordships find themselves compelled to differ from the able judgment under review. This relieves the case from the difficulty pressed, that the case ought to be very strong before, on a mere question of fact, a Court, constituted as this is, should dissent from the Court in *India*, before which the witnesses were examined, and which possessed such peculiar means for arriving at a correct conclusion. We have, as I have said, to look at the evidence from a different point, and to submit it to a different test. Now, on this evidence, their Lordships are not sure it would be right to dissent from the expressions on the subject in the very able judgment delivered by Mr. Justice *Colvile*, in the name of the whole Court; one is, that in which he speaks of the evidence as unsatisfactory at best, and the other is this: "Now, although several witnesses have been examined, and a large mass of documentary evidence has been put in on both sides, we cannot say that the evidence, on the one side or on the other, is conclusive upon the question of intention." If that is a correct view of the evidence, as it is likely to be, the result is favourable to the Appellant and not to the Respondent, because the burthen is on the Respondent, and the evidence being assumed to be correctly viewed in the passage I have just stated, he does not discharge himself of the burthen. To enter into the evidence a little more in detail, the grounds on which the Respondent relies, are the age of the Respondent at the time of the purchase, the English form of conveyance, the accounts kept by the father in his books, including particularly the debit of Rs. 64,000 in the name of the Respondent, the different mode in which this purchase with the purchase of *Chettra*, were treated in the books of the father from purchases made in the names of other persons; a document submitted to him as a case in another cause, containing a statement of his title, though this is claimed on each side; certain letters relating to the property; certain memorials addressed, one to Mr.

Thompson, the Deputy Collector of *Hooghly*, and another to the Deputy-Governor of *Bengal* relating to the tenure of the property, and parol evidence as to conversations; to which may be added the evidence of the Respondent and Appellant after their father's death, which happened in 1842, the benefit of which is claimed on each side.

With regard to the age of the Respondent, their Lordships are of opinion, that no weight is to be attributed to it: they believe it to be as usual to buy in the names of minor chilren as of others, and in this particular family another purchase, the *Buttallah* house, was made in the name of this very child, the Respondent, when not much older than he was when the purchase in question was made. The form of the conveyance was insisted on to show that the father wished the English law to apply in this case; but their Lordships are of opinion, that though the observation was a fair one to make, it would be right to give weight to a deduction which, if I may say so, seemed to be too far fetched. As to the books, it seems impossible to extract from them anything favourable to either side, for their Lordships are not satisfied that they are not kept irregularly. As to the price of Rs. 64,000 debited to the Respondent, it does not appear until some years after the purchase—a singular mode of keeping the accounts in any event; but, considering the other entries in the books, the conclusion to which their Lordships would come, if obliged to come to any, would be, that it was an account of a transaction in the name of a person rather than an account with a person. As to these *talooks* being treated after a certain time in a different way to the other purchases, this might give rise to some observations, but when the question arises whether an estate *primâ facie* belonging to one shall be taken from him on account of entries in ill-kept books, which may be accounted for in many ways, and he whose books they were had gone to his grave, it appears too unsafe to give this particular explanation to a circumstance which is possibly unsusceptible of any explanation, and which the father, if living, would probably have not been able to explain. With regard to the evidence of *Carter* and *Storm*, and the letter to *Storm*, and the memorials to Mr. *Thompson* and Colonel *Morison*, their Lordships think they are explained by the legal nature of the title. In one case before Sir *Edward Ryan*, which I mentioned just now, the mode of giving receipts for rent and management was held to pass no legal ownership, and their Lordships think these documents are to be explained on that theory. Parol evidence is given of conversations during the life of the

father, who died in 1842, but at this distance of time their Lordships think it would be unsafe to allow the title at law to be effected by them. Their Lordships having to consider the evidence from a different point of view to the Supreme Court, are of opinion, that if this were a time close on the death of the father, their view of the evidence would be rather unfavourable, than favorable, to the Respondent; but it is sufficient that the evidence prove neither one thing nor the other. This, perhaps, would be a just estimate of it; but if not, the conclusions which I have before given would be.

We then come to the conduct of the brothers after the father's death—conduct to which much weight cannot be attributed either way; it would seem that parts of their mode of dealing with the property are in favour of the Respondent, and parts in favour of the Appellant, but no part of their conduct can be considered as wholly belonging to or supporting the theory of either party; they continued a considerable time after the death of the father, and after the Respondent came of age, to receive jointly the proceeds of the *talook* in question, and this conduct of the Respondent is rendered remarkable by the evidence of *Ruggobanchunder Lahoree*, the brother-in-law of the Respondent. His evidence is in these terms:—"I am the son-in-law of the late *Rogoram Gosain*. I married his daughter in 1836, and have lived ever since in his family house at *Serampore*, and live there still. The title deeds of the family property were kept in a room adjoining one which *Rogoram* used as his office, in his family house; all the family documents were kept in that room; some papers may have been lying about in another room, but, generally speaking, all deeds and papers were kept in the room I speak of. I know the two *talooks*, *Gheritty* and *Chattra*. There were title deeds belonging to both of them; and in the life-time of *Rogoram*, these deeds were kept in separate tin boxes, in the room I have spoken of, next to *Rogoram's* office, and of which *Rogoram* himself kept the key, up to the time of his illness. He then handed the key to me, and I retained it up to the time of his (*Rogoram's*) death; and I then gave it to *Gungapersaud Gosain*, *Rogoram's* eldest son. I gave him the key about six or eight months after *Rogoram's* death, and it may have remained with him ever since. *Rogoram* died in 1842; and his son, *Gungapersaud* is about twenty years old, and *Gopeekrist* a year or two younger." On his cross-examination he says, "I gave up the key to *Gungapersaud* after his father's death. *Rogoram* gave me the

key when he became ill, and told me to give it to *Gungapersaud.*"

We must then remember the whole course of conduct on the part of the Respondent and the Appellant, who were in joint receipt of the rents, having possession of the title deeds, and who, therefore, knew what the title was. Stress has been laid on the accounts kept of Mr. *Rattray's* loan, by which it was said to appear that a sum of money which the Appellant refused to lend, was carried to the Respondent's account as for *Gheritty*. Their Lordships are of opinion that it would be unsafe to give such a character to the transaction; they think that it probably was, that the sum was to be debited in some way to the Respondent rather than to the Appellant, and that it was not intended to affix any particular character to the account in which it might be found. Their Lordships, however, think that the views which the sons may have taken of the matter are of very little importance; they may have mistaken their rights, and their conduct can only be material as being that of persons knowing what the father's intention was, and as, therefore, proving that intention; but it appears that they had no means of knowledge beyond what the Court at *Calcutta* and the Court here have, for there is no trace of any communication having passed between their father and them, and, therefore, their conduct since the father's death does not afford any valid ground for changing the view of the case which would have prevailed at the death of the father if it had just occurred.

On the whole, it is not necessary to express any dissent, or, at least, to any great extent, from the view taken by the Supreme Court of the evidence. The Court thought it was not conclusive, their Lorships may say the same; the presumption, however, remains in favour of the Appellant: but if the evidence is to be taken as of any value, of their Lordships view it that it is rather in favour of the Appellant than of the Respondent. Another point arises, but the case seems hardly touched by the pleadings. It appears that *Rogoram Gosain* and his brother formed a family their property was joint, and there is no proof that the Rs. 64,000 were not part of the joint property; if they were, and perhaps the true inference may be that it was joint property, both families would have been interested in these purchases; but the family of the father's brother are bought off: this would leave the property part of the joint family property of *Rogoram Gosain*, in which case it would belong to the

two sons. If this view is open on the pleadings, which we do not say, the Appellant would on this ground be entitled. On the whole, then, their Lordships feel bound respectfully to dissent from the judgment of the Supreme Court. The dismissal of the bill cannot, therefore, stand; there are no costs to be dealt with, the bill having been dismissed without costs. Their Lordships will declare that the purchase was a *Benamee* purchase, and will also declare the party in whose name it was made was a trustee for the father, and that the property in question was part of the father's estate at the time of his death.

Mr. *Dickens* suggested that the declaration should extend to *Chattra*, to avoid chances of further litigation between the parties, which was agreed to by the Appellant's Counsel and the Court.

Their Lordships made the following report, which was confirmed by Her Majesty's Order in Council:—Declare that the purchases by the late *Rogoram Gosain*, in the pleadings mentioned, of, amongst others, the *talooks*, *Gheritty*, and *Chattra*, with their appurtenances, severally comprised in the indenture of lease and re-lease, dated the 12th and 13th days of *July*, 1825, and the indenture of lease and re-lease dated the 29th and 30th days of *January*, 1832, in the name of the Appellant and Respondent respectively, as in the pleadings mentioned, were and are *benamee* transactions, and that the Appellant and Respondent thereby severally became and thenceforth continued, and were, up to and at the time of the death of their father, *Rogoram Gosain*, trustees respectively for him, as the absolute and beneficial owner of each of the two *talooks* respectively, with their appurtenances aforesaid. And that it ought to be further declared the *talooks*, *Gheritty* and *Chattra*, respectively, with their appurtenances aforesaid, were, at the time of the death of *Rogoram Gosain*, integral parts of the estate and property of him, *Rogoram Gosain*, and that execution upon the judgment (if any) in the action of ejectment in the pleadings mentioned, and all proceedings in the action, ought to be stayed, and that in case the possession shall have been changed under any execution issued upon the judgment, such possession ought to be restored as the same stood before such execution was issued; and their Lordships are further of opinion that the cause ought to be remitted back to the Supreme Court, with directions to the Supreme Court to give effect to this report and to Her Majesty's Order made thereupon: and their Lordships not thinking fit to deal with the costs incurred as aforesaid, do recommend the Supreme

Court to deal with the costs of the parties incurred and to be incurred in the Court, below, as to the Supreme Court having regard to the declarations and directions aforesaid, as also seem just (*a*).

(*a*) Upon the doctrine of purchases made in the name of the nominee of the vendee, the nominee being the son or a person the purchaser had a natural obligation to provide for by the Roman Law, see Code lib. v. tit. xvi. "*De Donationibus inter virum et uxorem*," &c. sec. 25; *Voet.* P. and lib. xxxix. tit. v., vi.; by the Scotch law, *Stairs'* Inst. of the Law of Scotland, b. i. tit. viii. sec. 2, and in addition to the English authorities cited in the argument, *Finch* v. *Finch*, 15 Ves. 43; *Rider* v. *Kidder*, 10 Ves. 360; *Collinson* v. *Collinson*, 3 De G. Mac. & Gor. 409; *Prankerd* v. *Prankerd*, 1 Sim. & Stu. 1; *Skeats* v. *Skeats*, 2 You. & Coll. N. R. 9, 11. See also, by the Hindoo law, *Sibchunder Kur* v. *Nund Gopal Mullick*, S. D. A. Dec. Beng. 605; *Rungama* v. *Atchama*, 4 Moore's Ind. App. Cases, 1; by the Mahomedan law, *Ruggoo Mull* v. *Bunseedhur*, 5 Dec. N. W. P. 147; *Newazee Feraush* v. *Mussummaut Atdussee*, 1 Ben. Sud. Dew. Rep. 31.

Benamee.—These *Benamee* transactions often give an opening for, and rise to, much fraud. They of course occasionally arise between others than persons forming members of one and the same family. The relation of *Benameedar* and *Benameedee* may thus arise between friends, or even perfect stangers, as where a man masks his property, to defraud his creditors, under impending insolvency. So far, they do not fall under a work on the law of inheritance. The principles are alike in all cases; but *Benamee* transactions are considered here, because they generally assume the shape of family transactions. Sometimes the question arises between the *Benamee* holder and other members of his family; sometimes between him and them on the one hand, and purchasers, mortgagees, or creditors, on the other. The true character of the transaction may always be shown: and the real criterion is, *whose was the purchase-money*; per Lord *Campbell*, in *Dhurm Pandey Doss v. Mt. Shama Soondri Debia* 3. Moore's I. A. p. 240. It was at one time held, by a long course of decisions in the Madras Court of Sudder Adawlut, that oral evidence was not admissible to contradict the written terms of the *Benamee* instrument, and to show the real nature of the transaction. Madras Sp. A. 127 of 1855; (referred to in *Manna Pillay* v. *Amoravati* Madras S. R. for 1860. p. 99.) *Oonoomallay Ummall* v. *Oaroonay Ummall.* ib. for 1858 p. 106. This was in fact to hold that a Trust could not be established by parol; and was a distinct præmium for fraud. But these cases were all expressly over-ruled in *Palaniyappa Chetti* v. *Armugam Chetty.* 2. Mad. H. Ct. R. p. 26, where it was held, that, as between Hindus, oral evidence is admissible, to show that land, nominally purchased for A, and conveyed to him by an instrument in writing, was really purchased for A. B. and C. Each case must be decided on its special circumstances; so long as Benamee transactions are recognised as the custom of

the country. The following remarks upon this pernicious custom were made by *Peacock C. J.* in *Wooma Soondeeree Dossee* v. *Dwarkanath Roy*. 11. Suth. c. r. p. 76. "If gentlemen will purchase and hold property benamee, keep fictitious books, and make false statements in petitions to Courts of justice and in their private correspondence, whether it be for the purpose of concealing property from their creditors or deceiving the members of their own family, they have only themselves to blame, and they must not be surprised if they are not believed when, for their own benefit, they offer themselves as witnesses in a Court of justice, and openly and without shame avow that all that has been said or done was false and fictitious for the purpose of carrying into effect their own infamous designs." The same case lays down that a *Benamee* transaction does not establish the relationship of *Trustee* and *Cestuique trust* between the parties for the purpose of keeping alive claims under Section 2. of Act XIV of 1859. (The Limitation Act.) The Court said, "I do not think that the relationship of trustee and cestuique trust existed between the parties. By Clause 13 Section 1 Act XIV of 1859, it is enacted that 'to suits to enforce 'the right to share in any pro- 'perty, moveable or immoveable, 'on the ground that it is joint 'family property ..... the pe- 'riod of twelve years from the 'death of the person from whom 'the property alleged to be joint 'is said to have descended, ... 'or from the date of the last pay- 'ment to the plaintiff, or any per- 'son through whom he claims, 'by the person in the possession 'or management of such proper- 'ty or estate on account of such 'alleged share. .....'

"This is clearly a suit within the meaning of that Section. The suit was not brought within 12 years from the death of Purmanundo Roy, and the plaintiff has not shewn that any payment was made to him or to any person through whom he claims by the person in the possession or the management of the property within 12 years next before the commencement of the suit.

"Section 2 of Act XIV of 1859 enacts that 'no suit against 'a trustee in his life-time, and no 'suits against his representatives 'for the purpose of following in 'their hands the specific proper- 'ty which is the subject of the 'trust, shall be barred by any 'length of time. * * *'

"The Judge has, it would seem, treated a benamee transaction as creating the relationship of trustee and cestuique trust between the benameedar and the real principals. But there can be no greater reason for holding that no length of time is a bar to a suit to recover property on the ground that it is joint family property, when the property is purchased benamee in the name of one member of the family, than there is for holding that it would be so barred if the property stood openly and honestly in the names of all the members. It would be dangerous to hold that a benameedar is a trustee for the real owner within the meaning of Section 2 Act XIV of 1859; for if such were the case, a person might after any length of time

sue another for recovery of property by getting up a fictitious case against him, however long he may have been in possession, that the property was conveyed to him benamee. Such a construction would tend still further to weaken the law, which, according to the judgment pronounced by the Judge of Beerbhoom upon the first issue, is at present not sufficiently powerful to suppress the evils consequent upon the pernicious system of benamee so prevalent throughout Bengal." See *Kalee Mohun Paul* v. *Bolanath Chakladar* 7. Suth. c. r. p. 138. In *Brojo Soondaree Debia* v. *Ranee Luchmee Koonwaree* 11. Suth. c. r. p. 13. it was held that the purchase of property in the name of an idol, where the purchase-money does not come from funds appropriated to the use of the idol, is not tantamount to a dedication of the property to the idol; it may be a *benamee* or merely fictitious transaction. And in *Hemanginee Dossee* v. *Jogendro Narrain Roy* 12. Suth .c. r. p. 236. It was held that, there is nothing fraudulent or illegal in a father making provision, that property over which he has complete control shall not go into the hands of an insolvent son; but a *benamee* conveyance to female members, the father continuing the absolute and uncontrolled owner during his life, and the son entering into possession after his death, cannot exclude the claim of the son's creditors.

The Benamee holder must show that he is the beneficial owner. It is not sufficient for him merely to produce his instrument, and rely on its allegations. He must show that the source of the acquisition was his own. *Saroda Mohun Roy Chowdry* v. *Shama Soonduree Dossia.* 3. Wym. p. 144. s. c. 7. Suth. p. 208. So in *Shecoram Ghose* v. *Dattaram Ghose.* 2. Beng. Sel. D. p. 53. where A and B were brothers, A purchased land in the name of C, the son of B, who claimed the property. It was shown that A and B had no property in common, and that the whole of the purchase-money was A's, who was in possession for seven years after purchase; enjoying all the profits. It was held that A had satisfactorily shown that he was the sole beneficial owner.

The Courts will anxiously watch that this custom of Benamee, a dangerous one, shall not operate to the detriment of third parties: and that the transaction shall not enure to the benefit of parties through their own fraud. Thus where the beneficial owners permit the Benamdar to deal with the property as his own, and borrow money on it, the beneficial owners cannot recover from the lender who has acted in good faith, and obtained a decree in satisfaction of which the land is sold. *Nundun Lall* v. *Taylor.* 1. Wym. c. r. p. 81. s. c. 5. Suth. c. r. p. 37. See *Rushbohany Lall* v. *Roy Goury Sunker.* Ib. p. 18. In *Rennie* v. *Gunga Narrain Chowdry.* 1. Suth. c. r. p. 10. it was held that a vendee who purchases for valuable consideration without notice of *benamee* from the ostensible owner of the property held by him under an apparently good title, will be protected from subsequent acts of the owner or his heir, both of whom were parties to the fraud; and his purchase will hold good

against any subsequent sale made by him. And see the same ruling, *Brajonath Ghose* v. *Koylash Chunder Bonnerjee*. 9. Suth. c. r. p. 593. In *Muddun Mohun Shah* v. *Bharut Chunder Roy*, 11. Suth. c. r. p. 249. a decree-holder in execution of his decree put up for sale certain property of his judgment-debtor, which was purchased by plaintiff ostensibly on his own account. Having reason, however, to believe that the purchase was *benamee* for the judgment-debtor, the decree-holder again took out execution against the same property and advertized it for sale. Plaintiff intervened, but his objections were disallowed by the Court which found the judgment-debtor in *bonâ fide* possession on his own account. The property was then sold, and one of the defendants bought it. Plaintiff then sued to have the execution proceedings set aside, and to have it declared that the property had been bought on his own account and with his own money. It was held that the *onus* of proof lay on the plaintiff.

But a purchaser must be so *bonâ fide*, and for value. If, therefore he has obtained neither title nor possession, he cannot clothe himself with that character. In *Bahadoor Ali Khan* v. *Meer Nussur Ali* 1. Suth. c. r. p. 115. the Special appellant, plaintiff in the suit, claimed as purchaser from Nasser Allee, and sought possession of the property. Defendant replied that Nasser Allee was a mere benamee holder; that she was the real owner, and had been all along in possession. The lower Appellate Court found the facts to be as stated by defendant, and dismissed the suit. Plaintiff urged in appeal, that as he was a *bonâ fide* purchaser for value from Nasser Allee, who was held out to the world as the real owner, and registered in the Collector's books, he was entitled to a decree. He specially relied on the decisions of the late Sudder Court, one of 23rd December 1851 (*Rajnarain Roy* v. *Juggernath Pershad Mullick and others*) page 774 of the Reports for that year, another of 26th June 1856 (*Ram Soonder Sandial and others* v. *Rajah Anundnath Roy and others*) reported at page 542 of the Reports for that year; also a case of this Court, page 293, Part 2 of Mr. Marshall's Reports, decided 18th February 1863 (*Rakhal Doss Moduck* v. *Bindoo Bashinee Debee*). The Court said:

"These cases go to this, that when a purchaser *bonâ fide* for full value makes out a complete title through a Benameedar, and has exercised ordinary caution and diligence, he is entitled to a decree, although the benamee holding be proved, and although neither the Benameedar nor the purchaser had real possession; the title with the ostensible possession of the Benameedar being sufficient. But in this case we do not think that the plaintiff has proved his title. The Collector's registry is, after all in strict law only, an evidence of possession, which as matter of fact in this case has been found against plaintiff. Defendant does not admit the title of plaintiff's vendor, she only admits that the title was put in his name. It was necessary then to make a complete title that plaintiff should have produced his title deeds. This he does not do.

He has no title deeds whatever. The deed of sale to Nasser Allee ought to be in his hands; he has not produced it. We think therefore that he has failed to make out a title, or such evidence of title as an ordinarily prudent and cautious purchaser would insist upon. We therefore think that, having obtained neither a title nor possession, he is not entitled to a decree. It is therefore unnecessary to say that he has not been found to be a *bonâ fide* purchaser for value, and may very likely be nothing of the kind." So in *Bhugwan Doss* v. *Apooch Singh*. 10. Suth. c. r. p. 185. the principles above set out were well illustrated, as well as the point as to the *onus* of proof. There, the title which the plaintiff sets up was as follows:—that the property in dispute originally belonged to one Gunga Pershad; that it was bought by Gunga Pershad in the name of Gour Surn Persaud; that on the 26th of July 1851, Gunga Pershad, through his *benameedar* Gour Surn Persaud, mortgaged the property by conditional sale to Bhugwan Lall; that on the 29th of December 1854, Bhugwan Lall foreclosed, and, dying shortly after, his widows the defendants Nos. 3 and 4 in this suit, obtained possession; and that finally on the 7th of July 1863, the plaintiff himself purchased the same property at an execution-sale effected in consequence of a decree passed against the widows. The Court said: The defendants 1 and 2 resisted the claim of the plaintiff, on the ground that Gour Surn Persaud's conditional sale on the 26th of July 1851, did not pass the property of Gunga Pershad, and that they, on the 1st of December 1851, bought the rights and interests in the same property at an auction-sale in execution of a decree against Gunga Pershad. And they say that in 1853, they had their names put in the Collector's Towjee and have since had enjoyment of the property. They, moreover, maintain that the foreclosure of the mortgage effected on the 29th of December 1854, cannot bind them, because they were no parties to the foreclosure decree: and, further that their rights were specifically reversed by the decree.

"It is obvious from this statement of the antagonistic claims of the plaintiff and of these defendants, that this suit depended entirely upon matter of fact. It seems to us that the Lower Appellate Court has found the facts as alleged by the plaintiff. We think that the Principal Sudder Ameen has, in terms, found that Gunga Pershad bought the property in the name of Gour Surn Persaud, and that it was on that account that the conditional sale of 26th July 1851, was made in the name of Gour Surn Persaud. If this be so, then the decree of foreclosure of 29th December 1854, obtained, no doubt, as far as concerns name, against Gour Surn Persaud alone, would be good and binding against the defendants Nos. 1 and 2, so as to foreclose the equity of redemption which they purchased of Gunga Pershad, unless they can show that the foreclosure was effected in fraud of them or of their vendor and consequently was void and inoperative. It was a matter of small consequence

whether their rights were reserved by the decree or not. If the notice which must have preceded the foreclosure decree of December 1854 was served upon the right person, then the decree will bind the equity of redemption, into whosoever's hands it may have passed. It might, no doubt, (supposing the fact were so) have been possible to show, that the notice of foreclosure was served upon Gour Surn Persaud, and kept from the knowledge of them the defendants, although the mortgagee was well aware that the equity of redemption had passed from Gunga Pershad, or Gour Surn Persaud, into the hands of the defendants at the execution sale: but until this is shown as a matter of fact, it must be presumed that the proceedings in the foreclosure were regular and valid, and as far as can be gathered from the record, Gour Persaud was the right person against whom the suit should have been brought.

"So again, we think we ought to observe, that the *onus* lay upon the defendants to show that the conditional sale executed by Gour Surn Persaud was not binding upon them or their vendor, if such were the fact, because if property is purchased in the name of a *benameedar*, and all the indicia of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by the *benameedar*, by showing that it was made without his own acquiescence, and that the purchaser took notice of that fact. It seemsto us certain that if the defendants desire in this case to have the advantage of Gour Surn Persaud's conveyance not being binding upon Gunga Persaud, it was for them to make out that it was not so binding. I am assuming of course, in stating this, that the facts are such as the Principal Sudder Ameen has found them to be. If then Gunga Pershad's interest in the property was mortgaged in July 1851 to Bhugwan Lall, and if his equity of redemption, into whosoever's hand it had passed, was foreclosed on the 29th of December 1854, it follows necessarily that the plaintiffs, who bought Bhugwan Lall's rights and interests on the 7th July 1865, obtained the absolute ownership, and consequently they are entitled, as against the defendants who dispute that ownership, to have a declaration in this suit that they are the absolute owners of the property."

In *Dhun Kishen Roy* v. *Hurro Chunder Roy*. 1. Wym. c. r. p. 263 it was decided that a near relative who purchases family property, and sets up, when the property is claimed as joint, a plea of self-acquisition on the part of his vendors, which he is unable to substantiate, is in no sense a *bonâ fide* purchaser.

Where the possession of the estate remained with the original owner, and the alleged conveyance and mutation of names was in favour of a near relation, a creditor was not defeated, on obtaining execution against the original owner. *Baboo Khather Mohun Moorkerjee* v. *Baboo Chunder Madub Ghose* 1. Suth. c. r. p. 217. See *Ameeroonissa Beebee* v. *Rinode Ram Sirkar*. 2. Suth. c. r. p. 29, where certain property standing in the name of

a wife was mortgaged by her to one B. The mortgage debt was paid off. The mortgagee having a decree against the husband, attached and sold the property. It was held that, though payment of the mortgage debt by the wife might have given her a lien on the property to the extent of any money paid by her out of her own funds, the mortgagee's acting on the wife's assertion of title did not prevent him, when he subsequently discovered that the property was really the deceased husband's, from making it available for the satisfaction of his decree against the husband.

So the heirs or representatives of, or private purchasers from, a party selling *benamee* in fraud of creditors, or pleading such a sale in order to recover the property afterwards, are bound equally with the original defaulters, and cannot take advantage of what must be held to be their own wrong. *Pasibhut Sahoo* v. *Radha Kishen Sahoo*. 3. Suth, c. r. p. 221. and in *Luchmee Narrain Chuckerbuttee* v. *Taramooney Dossee*. Ib. p. 92. it was held that a party cannot allege or plead his own fraud. Nor can his representatives, or private purchasers from him do so, unless they are themselves the defrauded parties and seek relief from the fraud. There the Court said; "Plaintiff sues to set aside a mokurruree created by his vendor from whom he purchased the estate by private sale. The deed of sale recited that mokurruree was a mere benamee created in fraud of creditors, and that the vendee might set it aside. The vendee had, therefore, full notice of the encumbrance.

"The defendant pleading a *bonâ fide* holding, alleges that the plaintiff's vendor has publicly admitted the reality of the transaction in a suit in a Court of Justice, and that is found to be so.

"It is quite clear that, if the plaintiff's allegation be true, the deed of *mokurruree* was a fraudulent one; and the Judge, holding that the plaintiff's vendor could not have come into Court on such an allegation, considers that the plaintiff himself is also similarly affected, and dismisses his suit. The leading case on the question of pleas of fraud of this kind is that of Trilochun *versus* Obhoy Churn decided on 28th December 1859, and in that decision we entirely concur. The effect of the decision is that a party cannot plead his own fraud, and that the party who makes that allegation must fail. If the plaintiff alleges that the deed is *bonâ fide*, and the defendant pleads that it is a fraud to which he was a party, the plea cannot be heard, and the plaintiff must have a decree. If the plaintiff alleges that he and the defendant were equally parties to the fraud, he cannot be heard, his suit must at once be dismissed. The case quoted and other cases sufficiently establish that the heirs of the fraudulent parties representing them are equally bound with the original parties. The only distinction sought to be drawn in this case is that the present plaintiff is not an heir but a private purchaser. We cannot draw any distinction. We think that all representatives are equally bound, and that the plaintiff is bound. The exception

is only when a plaintiff is himself a defrauded party, and comes into Court for relief from a fraud against himself perpetrated by his vendor in collusion with the other party. This would, we think, be the case of a purchaser at a compulsory execution sale; because the fraudulent transfer would be, in fact, a fraud committed both against the creditor and against the execution purchaser. It may also be that, if plaintiff's vendor had defrauded him by concealing this tenure altogether, and inducing him to give valuable consideration in ignorance of it, he might, on proving such a case have a good action against both the parties who created the fraudulent tenure. But in this case he cannot say this—on the face of his deed of sale, he was made aware of the transaction.

"We think, then, that plaintiff stands simply in the shoes of the vendor, and that both the vendor and his present representative are equally incompetent to come into Court, alleging the vendor's fraud. If it were otherwise, a fraudulent party himself precluded from bringing a suit, might cure all defects by simply setting up a purchaser under himself, while he would obtain through a purchaser the value of a good title."

With this case compare *Seshyia* v. *K. Kandayia* 2. Mad. H. Ct. R. 249, where the Plaintiff sued to recover a house alleged to have been sold by defendant to Plaintiff's father. The Defendant pleaded that he had received no consideration for the document, which was really executed to secure the house against an attachment for rent. There the Court said, "Mr. *Mayne's* argument was that the sale being complete, the plaintiff could make out his cause of action without any reference to the fraudulent matter, if such there was, and that the Civil Judge was right in his view that the plea was altogether bad and that such a plea could not be pleaded.

"The fallacy of the first of these arguments is the treatment of the document executed as the sale. A document itself is merely evidence of the transaction which it embodies. The principle is, as usual, well stated by the Civilians. "Emtio venditio perfecta est et mutuæ obligationes ex eâ fundatæ sunt simulac convenit inter contrehentes de re et pretio." So that the perfected agreement creates the respective obligations of vendor and purchaser. One of the vendors is of course to deliver the thing sold, and if the obligation is not fulfilled it must be enforced by the action of the purchaser, as the plaintiff seeks to enforce it in this case. Then if the defendant can successfully show that, the agreement being void, no obligation has arisen, the plaintiff will fail. That a defendant, as was contended, cannot take advantage by plea of a joint fraud or illegality in the contract has, of course, no foundation, and the reason is that given by Lord Mansfield in *Holman* v. *Johnson* to which we referred during the argument:—

"The objection," says Lord Mansfield "that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is

ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this:—*ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise ex turpi causâ, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, '*potior est conditio defendentis.*'

"The Civil Judge was, therefore, of course in error in supposing that the defendant could not plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff was seeking to enforce by action. A large group of these pleas will be found in *Bullen and Leake*, page 511.

"As to the distinction which Mr. Mayne drew between acts voidable by Statute and at Common Law that distinction was stated in many of the old cases, but it applied solely to acts to be done under the contract and not to illegality in the consideration. Illegality in the consideration, whether by Statute or Common Law, rendered the whole contract void. As to acts to be done under the contract where the consideration is good, the performance of those which are legal, if severable from those which are illegal, will be enforced whether the illegality arise from Statute or Common Law, except in the cases of Statutes which by their language render the contract absolutely void. Of course the rule operates against the party who wishes to set the Court in motion. How terse the doctrine of the civilians, not differing materially from the rule of the law of England! "Si cui aliquid ob causam respectu solius ejus qui accepit, non etiam ejus qui dedit, turpem datum est; qui dedit illud condictione ob turpem causam repetere potest sed sine *usuris.* Sin datum est ob causam respectu solius ejus qui debit turpem, hic datum repetere nequit, æque atque si turpiter et datum et acceptum est;" and this is exactly the rule to be applied to the present case. If the defendant were seeking to eject the plaintiff and came into Court alleging that the sale was merely colourable, made to avoid the effect of an impending action, he could not recover because '*turpiter et datum et acceptum est.*'

"*Doe* v. *Roberts* and similar cases proceed upon the distinction between specialties and simple contracts. The deed established the title to the premises, and the defendant could not defeat that title by setting up his own fraud. He could not plead want of consideration because a deed requires none to render it effectual. Where, however, it is sought to

enforce a simple contract, we all know that the consideration must be made out. The defendant's answer is that there was no valuable consideration, and the statement of the fraudulent consideration is a mere repetition of this." In *Mohesh Chunder Banerjee* v. *Sreemutty Baroda Dabee.* 11. Suth. c. r. p. 185, the Court held that the principle of law which would prevent the plaintiff from asserting the invalidity of the benamee deed, applies just as strongly to the defendant asserting its validity, and the question is, how the matter would stand if the deed were not in existence.

A Trust attaches to the Benamdar, which he cannot shake off by getting the form of the instrument made more favourably for himself. *Mortiali* v. *Chinniah* 2. Str. N. of C. p. 163 ; and the heir of the Trustee is himself a Trustee. *Purappavanalingum Chetty*. v. *Nullasivan Chetty*. 1. Mad. H. Ct. R. p. 415. *Deva Rau* v. *Venkatesa Achariyar* ib. p. 452. A very recent case in the Madras High Court, *M. A. Lakshminarsu Puntulu and other* v. *Tota Gopiah.* 4. Mad. Jur. p. 367 affords a good illustration of a Benamee transaction. The following extract from the judgment sufficiently explains the facts :

"We proceed to the second issue in this appeal, namely the liability in this suit of the 2nd defendant. The contention for the plaintiff was that the 2nd defendant was equally interested with his son both in the first and also in the second lease and that the fact that the 1st defendant alone was the ostensible lessee was due to the circumstance that at the time of the first lease the Deputy Collector in the same district and so could not possibly appear in the transaction, and at the time of the second lease was still a Deputy Collector, though employed in another district. Various letters from the 2nd defendant were referred to as indicating the real nature of his interest under the lease. For the 2nd defendant it was at first urged in the Court below that he and the 1st defendant were divided members of a Hindu Family and alleged deeds of division were put in and evidence to their execution given ; but this part of the defence was subsequently abandoned and the defence made was a denial that the 2nd defendant had any pecuniary interest in either lease, the words and acts of the 2nd defendant being imputed to mere paternal solicitude for his son's welfare.

"The present suit is based entirely upon the bond executed to the plaintiff by the 1st defendant alone. The consideration for its execution was the undertaking by the plaintiff at the 1st defendant's request to pay to the Zemindar the balance found due to him under the first lease. It is admitted that the plaintiff has in fact not paid anything to the Zemindar, but it is the case that the 1st defendant, and if jointly interested in and liable under the first lease then the 2nd defendant also has or have (as the case may be) been released from all liability to the Zemindar on this account, and it is not questioned that the plaintiff remains bound and liable instead of them to the Zemindar for the debt. The question therefore is whether though the bond was in form

that of the 1st defendant alone, he was acting not merely in his own account, but equally for and on behalf of the other undivided member of the family and the contract with the plaintiff was so understood and intended by both parties thereto. There can be no doubt that from the peculiar relation of members of an undivided Hindu family, one member when acting with the recognition and assent of the other members as managing member may (though not the senior member of the family) conclude by contracts made in his own name the other members and render the entire family property liable for the obligations contracted by him in his own name alone. The first question therefore for consideration is whether the transactions regarding the leases were on account of the family or were the separate dealings of the first defendant. The answer to this question will afford ground for a strong though not an unavoidable inference as to the nature of the obligation evidenced by exhbit A. The fact that the 1st defendant in whose name alone every thing was done is the son and the other member of the family the 2nd defendant is the father would without more point to the transactions being on the former's separate account. But then at the time of the first lease there was the strongest reason why the 2nd defendant should not wish to appear in the matter and why every thing should be done in the name of the son, for the father who was an influential revenue official in the very district in which the purgana leased was situated. He could have very little doubt how the higher authorities elsewhere if not also the local authorities would be likely to regard the matter.

"The second lease was but a continuation of the first, and the 2nd defendant though then removed to another district was still a Deputy Collector, and the motive for keeping himself in the back ground was still great if not quite as strong as before. Further the 1st defendant was a young man of only 20 or 21 certainly dependent on his father for means, and apparently unaccustomed to business, while both leases and especially the first involved great pecuniary risk and responsibility. Then we come to the words and acts of the 2nd defendant and his admitted visits to the Zemindar at the time of the granting of the first lease. The acts of the 2nd defenddant in sending his son Government Promissory Notes and jewels were immediately connected with the performance of the lease; and as to the letters of the 2nd defendant some are admitted and as to all there really can be no reasonable doubt of their genuineness. Taking all these circumstances together it certainly would require a large amount of credulity to believe that the son was merely acting on his own and separate account and that all that the father said and did is to be imputed to paternal affection and anxiety. There can be no doubt that the Civil Judge is right in his opinion that but for the 2nd defendant having been at the time Deputy Collector at Masulipatam the first lease in all probability never would have been granted at all.

"Then this being so, it clearly affords a very strong ground for believing that in regard to the contract with the plaintiff also, the 1st defendant was authorized and known to be acting as well for his father as for himself and that the parties dealt with each other on this footing. The plaintiff from his position and knowledge of what took place during the first lease, could of course not have been ignorant of the real interest of the father. The settlement of the accounts under the first lease, the granting of the second lease in substitution of the first and the execution of the bond exhibit A to the plaintiff were all so intimately connected that the inference appears almost irresistible that the position occupied by the 1st defendant and the character in which he dealt and was dealt with was precisely the same in respect to all these transactions. Every circumstance seems to us to lead to the conclusion that not being able to appear in the matter without risking his position as a public officer, the 2nd defendant through his son provided the means and effected the several contracts for their joint benefit. That being so the liability of the 2nd defendant for the obligation contracted under exhibit A by the 1st defendant follows as a necessary consequence."

Adverse and undisturbed possession by the beneficial purchaser for more than twelve years not only extinguishes the nominal title of the *Benamee* purchaser, but creates a title in the former, capable of devolving on his legal heirs and representatives. *Booa Russoolee* v. The *Nawab Nazim of Bengal*, 11. Suth. c. r. p. 38.

LUXIMON ROW SADASEW V. MULLAR ROW BAJEE.

2. KNAPP'S PRIVY COUNCIL REPORTS PAGE 60.

On Appeal from Bombay.

LUXIMON ROW SADASEW, *Appellant.*

AND

MULLAR ROW BAJEE, *Respondent.*

In a suit for the division of the property of an undivided Hindoo family, the whole of the property of each individual is presumed to belong to the common stock, and it lies upon the party who wishes to except any of it from the division, to prove that it comes within one of the exceptions recognised by the Hindoo law.

This was an appeal from a decree of the Governor (the Honourable Mountstewart Elphinstone) of Bombay, in Council, dated the 22nd of August 1822. The appellant was the adopted son, the respondent the nephew, of Sadasew Punt Bhow, the prime minister of the Peishwa, who died in 1817. The only question between them that was argued before the Privy Council, (although many others had been made and decided in the course of the proceedings in India) was, whether the respondent was entitled to a third part of the Bhow's property. The grounds on which he founded this claim were, that on the death of Mankopunt, the father of the Bhow, in 1770, no division of his property had been made between his three sons, Kristnajee Nana, the Bhow, and Bajee Row, the father of the respondent; and that, by the Hindoo law, until a division of a joint property or inheritance of this description is effected between the members of a family, the acquired fortune of each member falls into and belongs to the common stock, and is divisible accordingly; and that, consequently, the common stock of the descendants of Mankopunt, including the acquisitions of the Bhow, ought to be divided between Kristnajee Nana, the appellant, as the representative of the Bhow, and the respondent, as the son and heir of Bajee Row. The appel-

lant contended, that he was entitled to the whole of the Bhow's fortune, subject to the burthen of allowing a competent maintenance out of it, for the Bhow's widows; and that it did not belong to the common stock of the family of Mankopunt, and ought not to be divided amongst his descendants as such, because the Bhow had acquired it by means of his own skill and capacity, without any assistance from the family property. On the conquest of the Deccan this family dispute was referred by the British Government to a punchayet, the members of which were chosen by the parties. After the case had for some time been under the consideration of this tribunal, and there appeared very little probability of their coming to a decision, Mr. Chaplin, the Commissioner of the Deccan, recommended that it should be referred to the decision of an arbitrator. The parties, in obedience to this recommendation, made choice of Captain Robertson, the Collector at Poonah, and Mr. Lumsden, his assistant, as arbitrators, who, after taking the opinions of the different members of the Punchayet, and also of the Shastrees employed in the judicial establishments of the Deccan, made an award, by which they decided that the respondent was entitled to a third part of the property of Mankeswar, including what had been acquired by the Bhow. An appeal was made from this award to the Governor in Council in Bombay, who made a decision in conformity with it, from which this appeal was made.

Spankie (Serjt.), and *Millar*, for the Appellant.

Adam (K. C.), and *Lloyd*, for the Respondent.

The cases and authorities referred to in the course of the argument were, the Mitacshara, cap. 1; s. 4, art. 8, 10 and 20, pp. 268, 269, 270, 271. Strange's Elements of Hindoo Law, vol. 1, p. 191. Colebrooke's Digest, vol-3, pp-332 & 343, ss. 247 & 352. *Zeebunsal* v. *Hurbuns Lal* and *Reeder Ram*, 1st Macnaghten, 91. *Purtal Bahaurder Sing* v. *Telukhdaree Sing*, 1st Macnaghten, 178. *Kashul Chukemuth* and *Radhanath Chukemuth*, 1st Macnaghten, 335. *Kaleepershund Roy and Others* v. *Dogneuder Roy*, 2d Macnaghten, 237. *Gudadnur Serma* v. *Agodhearam Chowdry*, 1st Macnaghten, 7; Daya Bhaga, cap. 6, s. 1, art 14.

LORD CHANCELLOR:

Their Lordships have taken this case into their full consideration, and they are of opinion, that no ground has been adduced, either in the course of the argument of yesterday or to-day, upon which they ought to re-

verse or interfere with the decision that has been come to in the Court below. They desire it, however, to be distinctly understood, on account of the importance of the question (which does not appear, however, to have been expressly raised), that they give no opinion whatsoever in the slightest degree interfering with the acknowledged principles of the Hindoo law, regarding the relationship which arises from adoption, and the consequences that follow from it. We think it right that this observation should be made, because there is a passage in a letter from the Chief Commissioner, Mr. Chaplin, dated Poonah, April 11th, 1821, which looks as if he, in an untechnical and somewhat popular view of the merits of the decision which he was then discussing, had taken into his consideration the circumstance of one of the parties standing in the relation merely of an adopted son, and not of a lineal descendant of the deceased Bhow, for he says "It must also "be considered, that he is merely an adopted son, and "not the lineal descendant of the deceased Bhow, and "that his own immediate ancestor contributed in no "respect to the acquisition of the property." However, "the relationship of adoption, the rights belonging to that relationship when established, and the law that gives those rights to the adopted son, independently of the fact of his own ancestors having had no share in the acquisition of the property, are by no means touched by the decision that Mr. Mountstewart Elphinstone has come to, which is now appealed from, and which alone is affirmed by their Lordships.

The grounds upon which Mr. Elphinstone appears to have come to this decision, were, that the proof lies upon the party seeking to except any property from the principles of partition known to the Hindoo law; and that the appellant, not having brought forward sufficient proof that this property was within the exceptions recognised by that law, the general rule of partition ought to prevail. It appears, from the cases that have been cited in the course of the argument, that the exceptions themselves form a sufficient ground for assuming that the proof of them lies upon the party who would seek to bring himself within them. They are very minute in their conditions, and in one instance that inference appears to be furnished by the rules of the Court restoring property to the operation of the principle, after it had been brought within the exceptions; for instance, learning is one of the undeniable exceptions; and, if that is proved, it brings the property within the exception; but it is

added, if it shall be shown, there was equal learning possessed by the other parts of the family, that gives them a claim to it, notwithstanding the circumstance of its having been brought within the exception. So that here one proof brings it within the exception, and another, notwithstanding, throws it back again. This is one illustration among, many others which might be given. I mentioned another in the course of the argument, as to the clothes of the party incapacitated, by nature or by accident, from procreating children, which appear by the Hindoo law to be excepted. All these details show that the proof must be upon the party seeking to bring it within the excepted case.

Now it appears here very doubtful, (and indeed although we may suspect it) there is no proof in the cause that shows how this property was acquired; but it is perfectly clear, as it appears to their Lordships, that there was some, although not a large family property, in which the Bhow shared, and which was never abandoned by him, whilst he was enjoying his more splendid fortunes in the Durbar, at Poonah; and it appears, too, from the correspondence between him and Bajee Row Mankeswar, in the 82d and 83d folios of the appendix, that he left his brother in some sort of charge of this property, and always appeared to take an interest in it, and to receive reports respecting the management of it, though his agent complains of not having received any orders from him. His brother says, when he was getting ready to proceed "to the appointment which had been provided for him, "You have quite suddenly provided this for me, as for "six years you have merely employed me in the charge "of the fields, &c., at home:" and there are other letters from Row Mankeswar, which show that the Bhow was still connected with the property. It cannot therefore be said, that there was no property, though it was very small; nor can it be said, that he gave it up, for he maintained a more immediate connexion with it, than would be supposed natural to a man placed in a much higher situation than the rest of his family, and separated from it by local circumstances.

Upon the whole, viewing this as a question of Hindoo law, (upon which it is impossible to speak with any great confidence), and the question appearing to their Lordships to have been decided upon proper grounds, throwing the proof upon the right party, and that proof not having been given, it is their opinion, that the decree appealed from must be affirmed.

With respect to the costs, we take for granted that the respondents, in a large property of this kind, will make no application for them; and it would not be an unfit thing (I do not know what the Court below have done) to suggest, that it would be proper that the costs of the whole proceeding should be paid out of the estate. It is a very large property; the question is whether it is 200,000 *l.* or a larger sum.

No objection was made by the counsel on either side to the suggestion of the Lord Chancellor as to costs; and the order of His Majesty in Council was made in conformity to it, "That the decree of the Governor in Council at Bom- "bay, of the 20th day of August 1822, be and the same "is hereby affirmed; and that the costs of this appeal, "both of the appellant and respondent, be paid out of the "property in question."

Status of Undivided family.— Joint undivided family is the ordinary *status* of the Hindoo. Sometimes this has been termed joint-tenancy, sometimes co-parcenery: sometimes co-parcenery with a benefit of survivorship. See *The Shivagunga Case.* 9. Moore's I. A. p. 611. *Lalla Mohibur Pershaud* v. *Mt. Kundun Koowar.* 8. Sutherl. c. r. p. 123. per *Peacock* C. J. The incidents of a joint family are not precisely those either of a joint-tenancy, or a co-parcenary, according to English Law. Mr. Grady, p. 220, points this out; and would substitute 'co-proprietorship:' but without pursuing this farther here, no proposition of Hindu Law is better established than that laid down in the Leading Case, (See 1. Str. H. L. 225. Str. Man § 287) which has been followed by a long course of confirmatory decisions, that the Law *presumes* a *status* of undivision as the primary continuing state of every Hindu family, until the contrary be shown; *Dharoo Sooklain* v. *Court of Wards.* 11. *Suth.* c. r. p. 336. *Moonayee Surmah* v. *Lomun Surmah.* 2. Suth. c. r. p. 288. and that the *onus probandi* rests on the party asserting a state of division.(a) Thus in *Dhurm Doss Pandy and others* v. *Mt. Shama Soondri Debiah.* 3. Moore's I. A. p. 229 the same law was laid down, with regard to the necessity of proof by one of a joint family, that property which he claimed was self-acquisition. There, Lord *Campbell* said: "It is allowed that this was a family who lived in com-

(a) Gautama. 1. W. and B. 321, Sutra. 3.
Nareda. Do. 351. Sutra. 5.
Menu. Vyavahara Mayuka. Ch. IV. S. VII. 36.
Smriti Chandrika. Ch. 16 18. and 19.
Madhavya. 67.
Menu. Ch. IX. 105, 108 and 111.
Smriti Chandrika Ch. II. S. II. p. 11.
Mit. on Onus Probandi. 1. Macn. Hindu Law. 165.
Nareda, Vyavahara Mayuka. Ch. I. S. I. 30.
Dayabhaga. Ch. III. S. I. 15 and 16.
Sancha and Lichita. II. Dig. B. V. Ch. I. V. 19.

mensality, eating together, and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is, that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property.(a) Such evidence may be received, but their Lordships are of opinion that such evidence has not been given in this case, with regard to any part of the property.

"Now what has been relied upon, with regard to a portion of the property, has been chiefly that it was purchased in the name of one member of the family, and that there are receipts in his name respecting it; but all that is perfectly consistent with the notion of its having been joint property, and even if it had been joint property, it still would have been treated exactly in the same manner.(b) We have heard from the highest authority, from the authority of Sir *Edward East* and Sir *Edward Ryan*, whose most valuable assistance we have in this case, (and it gives me a confidence that I should not otherwise have felt) that the criterion in these cases in *India*, is to consider from what source the money comes with which the purchase-money is paid.(c) Here there has been no evidence given that the Appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid; therefore, I think, that so far on this part of the case, no difficulty can be entertained, and that the whole of the property must be considered as joint property." So in *Gopeekrist Gosain* v. *Gungapersaud Gosain*. 6. Moore's I. A. p. 53, *(Supra.* p. 133.*)* the same law was laid down with respect to a *Benamee* purchase of real estate in the name of one of several sons. See also *Sreemutty Soorjeemunee Dossee* v. *Deenobundo Mulluk*. 6. Moore's I. A. p. 538. *Naragunty Luchmidavummah* v. *Vengama Naidoo*. 9. Moore's I. A. p. 66. *Prankishen Paul Chowdry* v. *Mootooramohun Paul Chowdry*. 10. Moore's I. A. p. 403. *Ram Persaud Tewarry* v. *Sheochurn Doss and others*. Ib. p. 490. *Mt. Cheetha* v. *Baboo Miheen Lall*. 11. Moore's I. A. p. 369. *Kattama Nauchiar* v. *Zemindar of Shivagunga*. 9. Moore's I. A. p. 539. s. c. 2. Suth. P. C. p. 31. Such is the course of decisions in the Privy Council. The rulings of the Courts in India will be found to be quite consentaneous.

The criterion, as was said *supra*, (1. Moore's I. A. p. 240) is to consider *from what source the money comes with which the purchase money was paid.* In *Dhunookdharee Lall* v. *Gonput Lall* 10 Suth c. r. p. 122. *Mitter*. J. pointed out that this though the chief, was not the only or indispensable criterion. He said,

(a) Mit. on judicature 1. Macn. H. L. 165.
Nareda. Vyavahara Mayuka. Ch. I. S. I. 30.
Yajnyawalkya. Mit. Ch. I. S. IV. 1.
Canka. Do do. 3.
Dayabhaga, Ch. VI. S. I. 19, 22 and 23.
Catyayana. Mit. Ch. I. S. IV. 8.
Vrihaspati. do. 15.
Mit. Ch. I. S. IV. 6.
Vishnu. Dayyabhaga. Ch. VI. S. I. 3.
Vyasa. Do. do. 5.

(b) Nareda Sutra. 5. W. and B. 351.

(c) Menu. Ch. IX. 206. 208.
Gautama. Sutra. 27. W. and B. 324.
Nareda Sutras. 6, 7, 10 and 11, W. and B. 351.

"It is a mistake to say that in every case in which a Hindoo pleads separate acquisition, it is incumbent on him to show the source from which the money came. No doubt, as remarked by their Lordships of the Privy Council in the case of *Dhurm Doss Pandey*, the source from which the money comes is the "chief criterion" for determining as to whether a particular property is joint or separate; but their Lordships never said that it is the *only* criterion, so as to render it obligatory on the party who pleads self-acquisition to give evidence of the particular source from which the money was derived." And therefore in that case, where one member of a Hindoo family claimed to participate in the property possessed by certain other members, alleging that it had been acquired from the proceeds of their joint-estate, and it was found that the family property was not sufficiently large, after supporting the members, to leave surplus funds for the acquisition, and that the defendants were at the time pursuing lucrative employments, the plaintiff being a minor, it was held that there was no ground for the usual presumption as to joint family estate, and the *onus* lay on the plaintiff to prove his allegation. And this must be not a mere ostensible or colourable passing through the acquirer's hands of the fund, but proof that it was *bonâ fide* his own. *Koonj Beharee Dutt* v. *Kitthurnath Dutt*. 8. Suthl. c. r. p. 271. See *Bipro Pershaud Mitee* v. *Kena Dayee*. 5. Suth. c. r. p. 82. where it was held that the burden of proof in cases of alleged separate acquisitions by a member of an undivided family possessed of joint estate, is on the person who advances such a claim, though not to the extent of tracing the very funds with which each purchase was made, from the time of their acquisition in a given year, to the moment when they were paid to the seller of the property. Though an important criterion in such cases is to consider from what source the money comes with which a purchase was made, yet there is no rule as to any particular mode of proof.(a)

In *Kisto Chunder Kurmokar* v. *Rughonath Kurmokar*, 10. Suth. c. r. p. 329, it was laid down that where property is purchased by a member of a joint Hindu family, the (mere ?) fact of his living jointly or in commensality with others, affords no presumption as to the source of the purchase money. There *Phear J.* said:

"The Principal Sudder Ameen considered that it lay upon the plaintiffs, not only to show that the property stood in the name of their grandfather, and to show a possession and enjoyment of the property on behalf of themselves and their predecessors, but further to show that the property was acquired by their grandfather out of his own funds as distinguished from the funds of the family. It seems to me that the Principal Sudder Ameen was wrong in this view. The plaintiffs and the defendants are certainly not now members of one joint

(a) Dayabhaga. XIV. 6 and 11. Mimansa. Mit. on judicature. 1. Macn. 196. N. I.

family. I believe that there is nothing in the evidence to indicate that when the plaintiff's grandfather apparently acquired this property, he and his brothers (the defendants' ancestors) formed a joint family. But even assuming that they were at that time thus living joint, I do not think that that fact alone affects the force of the title-deeds as evidence of ownership. In my opinion, it has more than once in effect been laid down by this Court that there is no presumption as to the source of the funds which constituted the purchase-money, arising merely from the circumstance that the person in whose name the property was acquired was living jointly or in commensality with others. I have on other occasions explained what I conceived to be the two presumptions which are made with regard to the *continuation* of *joint* property and *joint living*, but I do not understand that any presumption arises by law against the plaintiff's title merely on the ground of his having been at the time of the purchase a member of a joint family."(*a*)

And in *Khelut Chunder Ghose* v. *Koonj Lall Dhur*. ib. c. r. p. 333, where the purchaser of the rights and interests of one member of a Hindu family in suing for possession, claimed a share of certain property, which had been originally purchased by another member, on the ground that it had been purchased from joint funds, it was held, that before it could be presumed from the fact of the members having lived in commensality, that the property was purchased from joint funds, plaintiff was bound to shew that there were joint funds, or other ancestral property, from which such funds could be derived.(*b*) There *Loch J.* said: "The first point before the Lower Court was whether the property was the sole property of Bholanath, or the joint property of Bholanath, Bhoyrubnath, and Brojonath. It appears to have been admitted that the three brothers Bholanath, Bhoyrubnath, and Brojonath, lived in commensality; and the Lower Appellate Court has considered this fact sufficient to warrant the presumption of Hindoo Law that a property purchased by one member of a family was purchased for the benefit of all the members, without ascertaining whether there was any ancestral property from which funds were derived for the purchase of this property, and he has required the defendant, who is the representative of the auction-purchaser of Bholanath's share, to prove that Bholanath purchased from his separate funds. The plaintiff, respondent in this case, alleges that the property was purchased by Bholanath and Bhoyrubnath from joint funds. We do not, however, find that any evidence has been given on the part of the plaintiff to show that there were other properties from which the funds for the purchase of this property could have been derived; and before calling on the defendant, as the Judge has done, to prove that this property solely belonged to Bholanath, and was purchased by him, the plaintiff

(*a* & *b*) Mit. on judicature 1. Macn. 165. p. 3. Yajnyawalkya. Mit. Ch. I. S. IV. 1.

should have started his case and shewn that there was some joint source from which funds were available for the purchase of this property for the family. The Judge appears to have thrown the *onus* on the defendant, special appellant in this case, and has given a decree to the plaintiff because the defendant has failed to prove his case." See *Seevagamy Nanchiar* v. *Zemindar of Ramnad.* I. Mad. Sel. D. p. 101. where it is laid down that when no property has been inherited, the party claiming must show, that what he claims is joint.(a)

And see further as to the *onus* of proof in these cases *Sheo Ruttun Koonwar* v. *Gour Beharee Bhukut.* 7. Suth. c. r. p. 449. *Gobindnath Sein* v. *Gobind Chunder Sein.* 10. Suth. c. r. p. 393. *Pearee Lall* v. *Bukhoree Lall.* 12. Suth. c. r. p. 124. *Bai Mancha* v. *Narotamda Kashidas.* 6. Bomb. H. Ct. R. c. a. j. c. 1. *et ibi casas. Sheo Ruttun Koonwar* v. *Gour Beharee Bhukut.* 7. Suth. c. r. p. 449. *Dhurm Das Pandy* v. *Mt. Shama Soondri Dibiah.* 3. Moore's I. A. p. 229. *Gour Chunder Rai.* v. *Hurish Chunder Rai.* 4, Beng. Sel. D. p. 162. *Chellama* v. *Yellappah Moodely* Mad. S. R. for 1855. p. 242. *Gane Bivi Parab* v. *Kane Bhivi.* 4. Bomb. H. Ct. a. c. j. p. 169. *Babashet bin Govindshet* v. *Jirshed bin Yesshet.* 5. ib. a. c. j. p. 71. *Mt. Soobhedhar Dossee* v. *Boloram Dewan.* Sutherland F. B. R. for 1862. p. 57. *et ibi casas. Shin Gholam Singh* v. *Baran Singh.* 1. Beng. L. R. c. r. p. 164. *Beer Narrain Sirkar* v. *Teen Cowree Nundee.* 1. Suth. p. 316. *The Shivagunga Case.* 2. ib. P. C. p. 31. *Lakhun Chunder Dallal.* v. *Modho Moockhee Dossee.* 5. Suth. c. r. p. 278. *Naragunty Luchmedavamah* v. *Vengama Naidoo.* 9. Moore's I. A. p. 66. *Gokoolanund Rai* v. *Soonder Narrain Rai.* 1. Morley n. s. p. 162. § 135. *Bamun Doss Moorkerjee* v. *Mt. Tarnee Dibiah.* ib. §. 136. and see Cases collected Morley. p. 486-7.

Commensality *alone* is not sufficient to raise a presumption that property is joint. The existence of joint funds out of which the property might have been purchased must also be shown. *Radhika Pershad Dey* v. *Dhurm Dossee Debia* 11. Suth. c. r. p. 499. but in *Chundro Tara Debia* v. *Buksh Ali.* Ib. p. 305, where the plaintiff proved commensality and joint trade, *and* the existence of some joint property before the family separated, it was held a *primâ facie* case, so as to throw the *onus* of proving self-acquisition on the defendant.

In *Anundoo Mohun Roy* v. *Lamb and others.* 1. Marsh. p. 169, it was held that the presumption being that an estate purchased by one of several brothers living in commensality is the joint estate of all, he who seek to dispossess the other brothers under a title acquired from the brother in whose name the estate was purchased, takes the *onus* of proving that it is the sole property of such brothers.(b) But the non-existence of ancestral property would to a certain extent rebut this presumption.(c) *Dhurrum Chand Satya* v. *Rajmo-*

(a) Menu. Ch. IX, 105. 208. and Mit. on judicature 1. Macn. H. L. 165.

(b & c) Menu. Ch. IX. 105. 208. and Mit, on judicature 1. Macn. H. L. 165.

hinee Dabya 1, Wyman. c. r. p. 227.

The mere circumstance of messing conjointly is in law no conclusive proof of co-parcenary in property.(a) In *Soobuns Lal* v. *Hurbuns Lal and another*. Ib. 91, it was held that the claim of appellant to a right of participation in certain property acquired by trade while appellant and respondents were in family partnership with their late father was not maintainable Judgment against appellant, the property having been acquired by one of respondents, exclusively, without aid from any joint stock of the family.(b) So in *Purtab Bahaudur Singh* v. *Tilukdharee Singh* Ib. p. 178, on a claim by the appellants to a fourth share of certain lands, as heirs of their father, it not appearing that the father had any title to the fourth share, the claim was dismissed. One of four brothers, who, while living in family partnership with the rest, obtained a considerable grant of land, was held to be exclusively entitled to it, by the Hindoo law, it not being shown that he obtained it by means of aid from any joint funds of the family.(c) See *Brij Rutun Doss* v. *Brij Pal Doss* Ib. p. 182. and see *Luckhun Chunder Dallal* v. *Moodhoo Mockhee Dossee*. 5. Suth. c. r. p. 278. A party who merely resides in a family house on account of his connexion by marriage or the like, acquires no title to share as a member. *V. Vencata Reddy* v. *G. Sooboo Reddy*. Mad. S. A. for 1858. p. 204. and see *N. Soobaroyadoo* v. *Dodda Chennoogadoo* Mad. S. A. for 1853. p. 143.(d) *Dossee Monee Dossee* v. *Ramchund Mohur*. 7. Suth. c. r. p. 249.

There is, however, a curious custom among the Reddys in the district of Nellore, and in some other districts of the Madras Presidency, known as '*Illatom*' by virtue of which a man on his marriage is, as it were, adopted into the family of his wife, lives in her family house, and becomes a sharer in the family property. See *Mopur Ademah* v. *Damavarapee Subba Reddy*. R. A. 103 of 1868 (not reported) heard before the Madras High Court on 10th November 1869, and *Saundary Ummall* v. *Kamatchi Ummall* Sp. A. 28 of 1859. Mad. Sud. R. for 1859 p. 250.(e)

Where brothers are living together, the presumption that their property is joint, is rebuttable by a clear admission or proof of the non-existence of ancestral property.(f) *Dhurm Chund Shatea* v. *Raj Mohishee Debee* 5. c. r. p. 145. *Lokenath Surma* v. *Ooma Moyee*

(a) Menu. Ch. IX. 208.
Smriti Chandrika. Ch. XVI. 6 and 16.
Yajnyawalkya. II. Dig. B. V. Ch. V. V. 352.
Vyasa. Do do V. 364.
Vyavahara Mayuka. Ch. IV. S. VII. 1, 2 and 33.

(b) Menu. Ch. IX. 208.
Dayabhaga. Ch. VI. S. 1 to 8.
Mit. Ch. I. S. IV. 2.
Menu. Ch. IX. 206.

(c) Yajnyawalkya. II. Dig. B. V. Ch. V. V. 352.
Dayabhaga. Ch. VI. S. I. 8.
Mit. Ch. I. S. IV. 1 and 2.

(d) Menu. Ch. IX. 104.
Nareda Sutra. 32. W. and B. 356.
Vasishta Sutra. 29. W. and B. 334.

(e) Catyayana. II. Dig. B. V. Ch. V. V. 365.
Vamana Purana. I. Dig. B. I. Ch. III, V. 99.

(f) Vide p. p. 226. (*d* and *e*)

Dabee. 1. Suth. c. r. p. 107. *Nilmonee Banerjee* v. *Surbo Mungula Debia* 2. Suth. c. r. p. 31. See *Bairy Cundapah Chitty* v. *B. Kristnamah Chitty.* 1. Mad. Sel. D. p. 372. Ib. 1. Morl. p. 606. § 4 a. But of course, on proof that the funds were not joint, the property is self-acquisition.(a) *Kishore Munee Dossee* v. *Sreekunt Sen. and others.* 7. Beng. S. D. p. 67. And see. acc. *Sheooram Ghose* v. *Dataram Ghose.* 2. Beng. S. D. R. p. 53.

Joint messing is consistent with separation in estate.(b) *Shib Narrain Bhose* v. *Ram Niddee Bhose* 9. Suth. c. r. p. 87. Joint performance of *Shrad* is consistent with a *status* of division, when separate living &c. exist.(c) *Rajkoomar Besasurkooma Singh* v. *Soobhnandan Koowar.* 1. Sevest p. 76. note.

Under the *Mitacshara,* father and son are a joint Hindu family, and when ancestral property is shown to exist, the presumption of law is, that all the property they are in possession of is joint, until it is shown that one member of the family is possessed of self-acquired property. In such a case therefore the burthen of proof lies on the member alleging self-acquisition. *Sudanund Mohaputtur* v. *Soorjoo Monee Dayee.* 11. Suth. c. r. p. 436. And see *Shibnarrain Bose* v. *Ramneedhee Bose* 5. Wym. c. r. p. 50.

In Narraina Iyengar v. *Veeraragavah Paroomal Iyengar.* Mad. S. R. for 1855 : p. 231 the Court said : " The constitution of a Hindoo family raises the presumption of unity of interests among them until the contrary may be established. The burden of proof thus rests with the party asserting division,(d) but the Civil Judge had thrown it upon the opposite side, and herein is his judgment wrong in law. To establish division, it is necessary that circumstances should be shown of a nature incompatible with any other condition of the family but that of division. In the present case no such circumstances exist. The Civil Judge after remarking that the Plaintiff has failed to prove that a union of interests exists in the family, notices, that the fact that the members live apart and have had separate transactions points to their being divided in interests. But such circumstances are far from conclusive of division. (e) Members may live apart from inconvenience, or by reason of discord, and in such latter condition, which is that of these parties, of necessity they must have separate transactions. There is no evidence that the parties have had separate transactions other than individuals so circumstanced might have, while still holding joint rights in family property."

In *Bairy Candappah Chitty* v. *Bairy Kristnamah Chitty.* 1. Mad. Sel. Dec. p. 372, where Plaintiffs sued Defendant for a share

(a) Mimansa, Mit. on judicature 1. Macn. 196. N. 1.

(b & c) Mit. Ch. I. S. I. 4.
Vyavahara Mayuka. Ch. IV. S. VII. 33.
Smriti Chandrika Ch. XVI. 16.

(d) Same as. 173. (a)

(e) Nareda, Sutra. 36. W. and B. 356.
Vyavahara Mayuka. Ch. IV. S. VII. 33.
Dayabhaga. Ch. XIV. 7 and 10.
Nareda, II. Dig. B. V. Ch. VI. S. 11 V. 387.
Smriti Chandrika. Ch. XVI. 16 and 19.

of joint-family property, the Defendant contended that the common ancestor was insolvent at the period of his death, owing to several debts ; that the only property he left consisted of one house, one shop, and certain jewels worn by the wives of his five sons ; that Mauree Chitty the eldest son having engaged in business, discharged the debts of his parent, and dying in Rowdry or 1800-1, his second son Permaul Chitty inherited the jewels and property acquired and left by his father : that twenty one years before, or about 1799, being a year previous to Mauree Chitty's death, the five brothers having inherited no paternal property, with a slight exception, agreed to hold a house and shop in common, to consider their respective wives' jewels as the separate property of those holding possession of them, and each brother to trade separately on his own account. And that in pursuance of this agreement he contracted loans, and traded upon his own separate account, whereby he accumulated property not exceeding in value 1,400 rupees. The Defendant also pleaded that Mauree Chitty's son, Permaul Chitty, on 30th January 1815, received his allotment of the dwelling house left by the common ancestors, and from the circumstance of his being the descendant of the eldest son of the family, the shop was made over to him as his separate property. And that the Plaintiffs, having received their fifth share or allotment of the paternal dwelling, and inherited all the possessions that Paupee Chitty acquired by separate trade, their claim should be rejected as litigious and groundless. A decree was given against him. The Sudder, on Appeal said ; " We are of opinion, that it was proved by general evidence and even by that adduced by the Appellant himself, that the parties lived together as united family till four or five years after the death of Paupee Chitty, in the year 1809-10, and as there was no formal separation of interest ; the presumption clearly is that the trade carried on by the five brothers was a joint and common concern. In the absence of all proof that there was a separation of interests between the members of the family, or that the property now in possession of the Appellant was of his sole acquisition, independent of funds or other aid afforded by his brothers, it is clear that according to Hindoo Law, the Respondents, the sons of Paupee Chitty are entitled to a share of that property."(a)

In *Pedru Prabhu and another* v. *Domingo Prabhu and another*. Madr. Sud. R. for 1860. p. 8, where the plaintiffs sued their brothers and father, *inter alia*, for land purchased by one of the brothers while managing the property on behalf of the undivided family, the lower Appellate Court disallowed the plaintiff's claim, on the ground that he had not shown that the land, which the Defendant claimed to be self-acquisition, was really joint-family property, as being acquired partly by aid of their means. The Court of Sudder Adawlut revers-

(a) Menu. Vyavahara Mayuka. Ch. IV. S. VII. 36. Smriti Chandrika. Ch. XVI. 18 & 19. Madhavya. 57.

ed this decision, on the ground that the *onus probandi* had been cast on the wrong party; and affirmed the decision of the original Court, which had decided in favor of the Plaintiffs, on the presumption that the lands were acquired by means of the family funds, and that he had not rebutted it.(a) See *Lallo Beharee Lal* v. *Lalla Modho Pershad.* 6. Suth. c. r. p. 69. In *Shiu Golam Singh* v. *Byran Singh.* 1. Beng. L. R. a. c. j. p. 164, s. c. 10. Suth. c. r. p. 196, the Plaintiff was held bound to show that the property he claimed was joint. There the Plaintiff claimed as purchaser of the undivided share of one of three brothers, who pleaded that it was the self-acquired property of the elder brother, who was not the vendor of the Plaintiff. The Court held that under the circumstances of the case, the *onus* did not lie on the Defendants, of showing that the property was not joint but self-acquired; as beyond the fact of their being brothers, the Plaintiff offered no evidence to shew that they were ever living in the joint enjoyment of any property. In other words, that the existence of any joint-family was not only not shown, but as far as the facts went, the reverse. This case does not militate with the general current of authorities. In the Madras case last quoted, where the *onus* was thrown on those asserting the property to be self-acquired, it is to be borne in mind that the Plaintiff and Defendants were shown to have been living together in common, and that the Defendant, who was alleged to have made the self-acquisition, did so while acting as managing member. In the Calcutta Case *Phear* J. said: "The first objection of the special appellant to the judgment of the lower appellate Court is this: 'that the lower appellate Court has thrown the burden of proof with regard to the question of separation on the wrong party, that is, your petitioner. It was for the defendants to prove their plea.' This objection really goes to the root of the whole contest; for if it cannot be maintained, the decision of the Principal Sudder Ameen must remain good against the plaintiff. It amounts to this, that whereas the Principal Sudder Ameen has come to the conclusion that the plaintiff has not proved his case, this objection urges that it was not for the plaintiff to prove his case, but for the defendant to establish his defence. And the reason why the burden of proof is not to rest upon the defendant, who is resisting, rather than upon the plaintiff, who is making the claim, is remarkable. The plaintiff says, that he is entitled, by purchase, to the property of one of three brothers, and alleging that the land which is the subject of suit, is the joint-family property of the three brothers, he seeks to recover his vendor's undivided share in it. The defendants entirely deny that the lands belong to the brothers jointly; and, on the contrary, aver, that it was the self-acquired property of the elder brother, who was not the vendor of the plaintiff. Upon this statement, the plaintiff's pleader argues, that the plaintiff's case is made out, for he maintains that

(a) Menu Ch. IX 105 & 208. Mit. on judicature 1 Macn. H. L. 165.

the brothers must be presumed to be living jointly until the contrary is proved; and, further, that all property acquired by one member of a joint-family must be presumed to be acquired for the benefit of the whole, until it is shown to be otherwise.

"We have looked as carefully as we can through the later decisions of the Sudder Court and of this Court, but we can find nothing which goes any way towards supporting this position. It is no doubt laid down in many cases that the normal condition of a Hindu family is joint; therefore starting with the fact of a family being joint, it must be presumed to afterwards remain joint, unless some proof of a subsequent separation is given. Also that where property is shown to have been once joint-family property, it is presumed to remain the joint property of all the members of the joint-family, until something to the contrary is shown. But, on the other hand, there is more than one case which lays down, that the single fact of a family living joint or in commensality, is not enough to raise a presumption in law, that property acquired by an individual member of that family is joint property.(a) To render it joint property, the consideration for its purchase must have proceeded either out of ancestral funds, or have been produced out of the joint property, or by joint labor. But neither of these alternatives is matter of legal presumption. It can only be brought to the cognizance of a Court of Justice in the same way as any other fact, namely by evidence —consequently whosoever's interest it is to establish it, he must produce the evidence.(b) In *Subhadra Dasi* v. *Balaram Dewan* the Chief Justice, in delivering judgment, remarks, "it was contended that as the two brothers lived in commensality, the presumption was that their property was joint." On this point he goes on to say the rule is correctly laid down in certain cases, which he mentions, and among these is the decision in *Kishori Lal* v. *Chaman Lal*; and on turning to the report of the judgment there given, we find the Court saying, "the *onus probandi* in this case appears to us to be clearly on the plaintiff. By his own admission the properties in dispute were not acquired by the use of the patrimonial funds, nor have the defendants ever ackowledged that they were acquired by the joint exertions and aid of the plaintiff, and his father. It was, therefore, for the plaintiff to prove his own allegations as to the original joint interest in the purchase of the properties. The mere circumstance of the parties having been united in food raises no such sufficient presumption of a joint interest, as to relieve the plaintiff from the onus of proof." It seems to me upon those authorities, and certainly upon the reason of the thing, that the plaintiff coming into Court to claim a share in property, as being joint-family property, must lay some foundation before he can succeed

(a) Menu. IX. 206. 208.
Cakala. Vyavahara Mayuka Ch. IV. S. VII. 29.
Vrihaspati. Smriti Chandrika. XVI. 6.
Dayabhaga. Ch. VI.
Mit. Ch. I. S. IV.

(b) Mit. on judicature 1. Macn. H. L. 165.

in his suit. He must, at least, show that the defendants whom he sues constitute a joint-family, and that the property in question became joint property when acquired, or that at some period since its acquisition, it has been enjoyed jointly by that family. It will be sufficient for this purpose for him to show that the family, of which the defendants came, was at some antecedent period, not unreasonably great, living joint in estate; and that the property in question was either a portion of the patrimonial estate so enjoyed by the family, or that it has been since acquired by joint funds. In this case, the Principal Sudder Ameen has found that the plaintiff has given no proof of the family being joint, beyond the admitted fact of the three persons being brothers, and the plaintiff has also given no sort of proof that these brothers ever were living in the joint enjoyment of any property, still less that this property was acquired by the use and employment of any joint funds. It seems to us that he was entirely right, on the finding, to dismiss the plaintiff's suit, without looking further into the case."(a)

The decision of the question whether or no a family is joint or divided, where there is no *Fureekut* or deed of division acted on, must in each case depend upon the particular facts and circumstances found in the case. There are many texts for the position which the Courts for a long time held, that nothing short of actual separation and enjoyment of property would constitute a division. See Strange's Man. § 282. 2. W. and Büh. p. 56. But were there is no *express* division, it may still be implied, and the partition found, just like any other fact. It is sometimes a point of some difficulty and nicety; as a family may be in fact divided, although apparently in a state of undivision; or undivided, though apparently in a state of division. This question may arise between the members of the family themselves, or between members of the family and strangers, or third parties. Each case must be decided on its own merits. It is impossible to lay down any general rules. The *status* may be deduced from circumstantial evidence.(b) *Doe dem Ramasawmy Moodelly* v. *Vallatha*. 2. Str. n. of c. p. 54. "Important," writes Sir *Thomas Strange*, "as the question may be to strangers, appearances as to the fact are not always to be relied upon. The legal idea of *undivided*, regarding, as it does, *property*, a family may be separated as to residence, meals, and ceremonies, so as to seem even to their neighbours, as well as to others, to be divided, without being so; remaining, in truth, united in interest. As, on the other hand, having parted property, they may have become legally divided by a severance in their wordly concerns; and yet, continuing to live and eat to-

(a) Menu. Ch. IX. 105. 208.
Mit. on judicature 1. Macn. H. L. 165.

(b) Vrihaspati. II. Dig. B. V. Ch. VI. S. II. V. 389.
Yajnyawalkya. do V. 385.
Nareda. Sutras. 36 to 42. W. and B. 356 and 357.
Vyavahara Mayuka. Ch. IV. S. VII. 33.
Dayabhaga Ch XIV. 7 to 10.
Mit. Ch. II. S. XII. 3 and 4.
Smriti Chandrika. Ch. XVI. 3 and 4.

gether, performing also in common their solemn and accustomed rites, they will appear to be still united, though; in reality, and to legal purposes, they are no longer so. This renders it, moreover, in many cases, where contested, (as it often is,) difficult to determine, whether the family be, or be not, a divided one. The question may arise among themselves, one member claiming partition, while the rest insist upon its having already taken place, at a time past. Or it may be raised by a creditor, having an interest in considering it as undivided, whereby he extends the fund for the payment of his debt, the credit having perhaps been given under this idea, though in truth, perhaps, a mistaken one. The obscurity in which it is sometimes involved, productive, as it is, not only of eventual litigation, but of occasional fraud and injustice, may be attributed to the law, allowing partition, without the presence of witnesses, or intervention of any deed; thus leaving a transaction of such possible consequence to others, as well as to the family, to be performed in secret, resting in the breasts, and in the consciousness alone of the parties. Where this has been the case, and the interest of any one is opposed to the claim, the fact remains to be collected from circumstances; observing, wherever the English rules of evidence do not prevail, the distinctions that have been noticed, as to the order and credit of the witnesses."

What are the facts from which we may infer the real *status* of a family are well exemplified by Sir *T. Strange*. "The presumption raised by the law, from the natural state of families, in favour of union, may be destroyed, by evidence of separate acts, inferring a contrary one, and amounting to proof of partition having taken place. Such are for this purpose religious ones, the religious duty of co-parceners being single;(a) dressing food;(b) transactions inconsistent with the idea of their continuing united, as making mutual loans, sales, purchases, and other contracts;(c) or becoming sureties, or witnesses for one another, on subjects of property.(d) To which, as indicating the understanding of neighbours, may be added, delivery, to them severally of provisions, and other dues, by the village peasants."(e) And See 2. Str. p. 280. 2. Macn. p. 169. 170. Note.

In *Elavambadoo Mootiar* v. *D. Nineappah Moodelly*, 2. Strange N. of Cases. p. 163, separation of residence and messing was held consistent with undivision.(f) Management of villages by the family is evidence against the claim of any member singly. Ib.(g) But in *Rajkishor Rai* v. *Widow of Santoo Doss* 1. Beng. S. D. R. p. 13, it was decided that a member of a Hindu family, among whom there had been no formal articles of separation, but who, as well as his father, had messed separately from the rest,

(*a*, *b*, *c*, *d* & *e*) Nareda. II. Dig. B. V. Ch. VI. S. II. V. 387. 388.
Vrihaspati. II. Dig. B. V. Ch. VI, S. II. V. 389.
Dayabhaga. Ch. XIV. 7 to 10.
Mit. Ch. II. S. XII. 3 and 4.

(*f*) Smriti Chandrika. Ch. XVI. 6, 16, 18 & 20.
Vyavahara Mayuka. Ch. IV. S. VII. 33.
Dayabhaga. Ch. XIV. 10.

(*g*) Menu. Ch. IX. 105. and
Mimansa. Mit. on judicature 1. Macn. H. L. 196. N. L.

and had no share in the profits or loss of their trade, though he had occasionally been employed by them, and had received supplies for his private expenses, ought not be admitted to claim a share of acquisitions made by others of the family.(a) See also *Khoderam Sarma* v. *Tirlochun.* Ib. p. 35. There it was held that if property be acquired without aid from joint funds, by the exclusive industry of one member of an undivided Hindoo family: others of the family, though they were at the time living conjointly with him, and still do so, have no title to share in his acquisition.

In *Badamoo Koer* v. *Wazeer Singh and others.* 5. Suth. c. r. p. 78. s. c. 1. Wym. c. r. p. 117. it was held (*E. Jackson J. dissent.*) that where, notwithstanding a separation in food and residence no *(formal)* partition of the family had taken place, the family must be considered, joint and undivided. There, *Seton-Karr* J. said 'Neither can I think the position 'sound that the presumption is 'that, when a Hindoo family is 'separate in residence and food, it is also separate in estate.' The Privy Council Ruling quoted seems to me to apply to a different state of things altogether, *i.e.*, where one shareholder has acquired separate property of his own. The contrary presumption, moreover, has been, I believe, the course of the rulings of our Court, and of the late Sudder Court; and, not to multiply instances, in a case decided by Justices *Trevor* and *Macpherson*, on the 30th of April 1864, No. 1715 of 1863, those learned Judges ruled that 'where no formal partition of the 'family estate has taken place, 'the family must be considered 'joint and undivided, and the 'succession descends accordingly, 'and this, notwithstanding a se-'paration in food and residence.' The Judges add, 'we come to 'this opinion, relying not only 'on texts and precedents, but 'also on the very theory of Hin-'doo Law by which the family 'and the property held by it are 'indissolubly connected, and the 'order of succession is regulated 'accordingly.'

"But, in the present case, the first Court has found, on full evidence, that there had been no division of estate, so that, even if the presumption of law had been the other way, no error in law has been committed. In appeal to the Judge, nothing was taken up but this, namely, what was necessary to show separation in a Hindoo family; and the Judge rules that separation in food and residence was not enough, as the appellant contended it was." and *L. S. Jackson*, J. said, "I think that, unless there has been a definitive separation in estate, indicated by separate enjoyment and distinct liabilities, the family must be held joint, and it will not establish a separation in estate to show that the different members of the family dealt separately with their shares of the proceeds, or even that they collected rents or profits from different parts of the estate: for that might simply result from some arrangement made for the general convenience

(a) Nareda. II. Dig. B. V. Ch. VI. S. II. V. 387. Vrihaspati. do. V. 389. Dayabhaga. Ch. XIV. 9.

of the family, and would not indicate any cessation of the joint rights or responsibilities."(a)

In a recent case before the Privy Council, *Srimati Sukhimani Dasi* v. *Mahendranath Dutt.* 4. Beng. L. R. P. C. p. 16 the plaintiff's family had come to a formal division in 1822, which had been acted on publicly, but which the Plaintiff's asserted was not acted or designed to be so, but was a mere device to protect the family property from the creditors of one of its members. In 1838 a second deed of partition was come to whereby a considerable portion of the family property was put in trust for idols. This trust the Defendants asserted to be a mere *benamee* transaction, to mask the property. The Privy Council said, "The burden of proof is on the plaintiffs. The deed of 1229 (1822) has the ordinary legal presumption in its favour that it is honest, and is, what it purports to be, a deed of partition. It is also prior in time. It is *primâ facie* a good and operative deed. It cannot be got rid of, except by the establishment of a case by the plaintiffs, as part of their proof, which involves all the family at that time, including those under whom they derive title, in the perpetration af a gross fraud. The deed of partition is declared by their pleadings to have been designed for the express purpose and object of defeating creditors. It is, however, said in the pleadings not to have been acted on. It is not clear in what sense this phrase is used, unless it be that all outward acts of the family in acting upon it disguised an inward design at variance with that which their actions declared. There is the most abundant, and indeed uncontradicted proof, that this deed was, by Harinath and his vendees, produced, established, and made the subject of various decrees. It is unnecessary to state the instances of this which were brought to the notice of their Lordships by Sir Roundell Palmer in his exhaustive argument. Mr. Field, in reply, did not deny that such was the case in numerous instances, but he answered that these acts were all the natural and premeditated results of the original device; that as it was a deed to defraud creditors, it would, of course, be used as such, and that such proof did not exclude the supposition that it might be considered *inter se* by the members of the family, as a mere writing, working no change of property amongst them. Without expressing any opinion upon the question, whether a plaintiff, supporting his case against those in possession, whom he seeks to evict, can be admitted to allege the inoperative character of an instrument by which his recovery would otherwise be barred, on the ground of a fraud in its concoction, to which all from whom he derives title are parties, their Lordships, treating the question as one unaffected by such estoppel, and one simply of evidence arising on the facts, have to observe that, as all these public acts would equally attend the enforcement of an honest and valid deed of partition, when the estates derived

(a) Mit. Ch. I, S. I, 4. also vide p. p. 178. (a)

under it are assailed, or rights derived under it have to be enforced, they furnish of themselves no evidence of *malâ fides*, and should be rather ascribed to the character given to the deed by the defendants, than to that imputed to it by the plaintiffs." The family was declared to have been divided effectually by the first deed.

In *Deela Singh* v. *Toofanee Singh* 1. Suth. p. 306. where the allegation was that the brothers were joint and the property was acquired by joint funds; the mere facts of the purchase having been made in the name of only one member of the family, of the registration of his name alone in the Collector's Books, of his having been allowed to carry on singly a law-suit with a neighbour in regard to the boundary between their lands and of the refusal of the Judge to give the other brothers a share of the costs decreed in that suit, (which afford but slight evidence of right and possession in any case) were, in a question of joint or separate acquisition, held wholly insufficient proof of separate acquisition.

The mere fact that the property stands in the name of one of several brothers will not suffice to prove that it is separate and self-acquired property.(a) Where a purchase of real estate is made by a Hindoo in the name of one of his sons, the presumption of the Hindoo law is in favour of its being a *benamee* purchase, and the burthen of proof lies on the party in whose name it was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate. *Gopeekrist Gosain* v. *Gungapersaud Gosain*. 6. Moore's I. A. p. 53 (*Supra* p. 133.) *Mun Mohinee Dabie*. v. *Soondamoonee Dabie*. 3. Suth. c. r. p. 31 *Lalla Beharee Lal* v. *Lalla Modho Persaud*. 6. Suth. c. r. p. 69. Nor will *mere* separate possession or evidence of separate acquisition; unless such separate possession can prove consent of the other sharers to his keeping a separate account. *ib.*(b)

The mere fact of one brother's name being used in documents relating to family property affords no presumption of his being the sole owner; especially where he is the eldest brother, or shown to be the managing member of the family.(c) *Janokee Dossee and others*. v. *Kisto Komal Singh and others*. 1. Marsh. p. 1. and see acc. *Kishen Komul Singh* v. *Janokee Dossee and others*. Suth. Full B. R. p. 3.

Alienation of shares is no proof of separation in interest. *Trilochen Roy* v. *Kishen Kishen Roy and others*. 1. Wym. c. r. p. 281. Parcels held in severalty will not rebut the presumption of joint ownership: so long as no partition is proved. *Sreram Ghose* v. *Sreenath Dutt Chowdry*. 7. Suth. c. r. p. 451. Entry of one as *Lumbadar* does not afford sufficient evidence of separation. See *Jaggomohun Bukshee* v. *Roy Moothooranath Chowdry and others*. 11. Moore's I. A. p. 224. And the possession of the *Lumbadar* is the possession of all,

(a) Mit. Ch. I. IV. 7. Dayabhaga. Ch. VI. S. I. 1 to 5. and Nareda Sutra 5. W. and B. 351.

(b) Mit. on judicature 1. Macn. II. L. 212-3.

(c) Vide 189 (c).

till re-butted. *Musshal Sing v. Yadult.* 9. N. W. P. R. p. 386. *Monohur Roy* v. *Mohummed Sahib Ali.* ib. 395, where it was held that it was not competent to the Government, under that Regulation, in the circumstances of the property being held by members of a joint undivided Hindoo family, to sell more than the fractional share and interest of the delinquent absentee, and that the fact of the lands being registered in the sole name of *A.* made no difference. See *Mussumut Cheetha* v. *Baboo Miheen Lall.* 11. Moore's I. A. p. 369(a) But *mutations* of names in the Collector's Register, or deeds of sale and mortgages, as amongst the members of a family, are evidence of separation. *Peary Loll* v. *Bhawoot Koer and others.* Suth. Full B. R. p. 18. But the mere entry of one in the Government books is no proof of undivision. *Bhageruth* v. *Thummun Sing.* 9. N. W. P. R. p. 97. s. p. *Sirdun Pandee* v. *Soogreem Pandee. ib.* 109.

Where there has been a joint succession to ancestral property, joint tenancy will be presumed, till the contrary is shown. *Mt. Joraon Koonwar* v. *Chowdree Doosht Dowun Singh & others.* 7. Beng. S. D. R. p. 26. (b) *Beer Narrain Sirkar* v. *Teen Cowree Nundee.* 1. Suth. p. 316. *Moonayee Surmah* v. *Lomun Surmah.* 2. Suth. c. r. p. 288.

Mere separation in messing is not sufficient to rebut the presumption of joint-family.(c) *Banee Madhub Mookerjee* v. *Bhugobutty Churn Banerjee.* 8. Suth. c. r. p. 270. See *Hurreehur Mookerjee* v, *Nobeen Mishore Banerjee.* 5. Suth. c. r. p. 251, a case of separate messing by Hindoos living in the same enclosure and with no apparent separate incomes; there, though, as mere presumption of law, the estate may be assumed to be joint until it is proved to be separate, yet, as the law limits such claims to 12 years, any honest party must be in a position to show whether he has had any enjoyment of the estate, either jointly or by division of profits, within that time.(d) See 2. W. and Bühl. p. 60. Q. 5. p. 61. Q. 6. p. 64. Q. 7. See 2. Macn. 172. 169. Ib. note. 170. and in *Rewun Persaud* v. *Mt. Radha Beebee* 4. Moore's I. A. p. 168, the Court said; "A separation from commensality does not, as a necessary consequence, effect a division or at least of the whole undivided property."

Where all invitations are sent by the caste to two brothers jointly, it is evidence of their unity of interest.(e) *Mt. Goolab* v. *Mt. Phool.* 1. Borr. 154. *Chalaib Manchand and another* v. *Jadavbai and others.* 3. Bomb. H. Ct. R. o. c. j. p. 87. See *Mt. Belas Koer* v. *Baboo Bhowanee Buksh Narain Singh and others.* 1. Marsh. p. 641.

Property acquired by a Hindu while drawing an income from his family is joint.(f) *Ramasheshaiya Panday* v. *Bhagavat Panday* 4. Mad. H. Ct. R. p. 5.

(a) Vide 189 (c).
(b) Menu. Ch. IX. 105. Mit. on judicature 1. Macn. H. L. 165.
(c) Vide p. p. 178. (a)
(d) Nareda, Sutra. 40. W. and B. 357. Smriti Chandrika. Ch XVI. 16.
(e) Jagannatha. II. Dig. 3d. 504.
(f) Menu. Ch IX. 105. 208. and Mit. on judicature 1. Macn. H. L. 165.

Where plaintiff sued four brothers on a bond signed by one only, and sought to charge them as jointly liable, it was shown that the brothers at the time resided in separate residence and carried on separate trades, the Court held that this raised such a counter-presumption of division as called on the plaintiff to rebut it, failing which, the suit was dismissed.(a) *Padijee-Ragavenhapah* v. *Anibati Gedda Subbayia* 1. Mad. S. R. for 1861. p. 23. In *Ganhapatti Venkataramana* v. *Sudom Ruchayia.* 1. Mad. S. R. for 1861. p. 101. the Court held that living and trading separately was no proof of a division of interests, especially as this had been the course of management during the father's life. And the alleged division was decreed against.(b) See also *Mun Mohinee Dabee* v. *Soodamoonee Debee and others.* 3. Suth. c. r. p. 31.

Division may be presumed from long acquiescence. Thus, notwithstanding the Plaintiff had received a smaller portion than his right, his acquiescence for nineteen years was held proof of the division.(c) *Linga Mulloo Pitchama* v. *L. M. Gooruppah.* Mad. S. R. for 1859. p. 84. See *Baboo Nundeal Bhurm* v. *Mt. Neela Buttee.* Beng. S. D. for 1847 p. 442. s. c. 2. Morley p. 3. 86. § 1. In *Somengowda Bin Dajamun Gowda* v. *Burmungowda* 1. Bomb. H. Ct. R. p. 43, where a member of a Hindu family, suing for a division, admitted on the face of his Plaint that he had taken possession of part of the family property, and for sixteen years lived separate; the *onus probandi* was held to be on him, to show that the circumstances under whch he became possessed of his portion of the property were consistent with his statement that the family remained undivided.(d)

Litigation with each other is evidence of division; as where it is shown that one member has sued another: but as long as the family continues joint, one member cannot enforce process against the other, in respect of their common property. *Lutchmy Koonjy Ummah* v. *E. Eleakummal Keshawoony.* Mad S. A. for 1854. p. 215. But one member of a joint family may purchase property from his coparceners *Sriram Venkatasobhia* v. *Venkataramaya.* Mad. S. R. for 1860. p. 212.(e) They may contract with each other in respect of their self-acquired property. Decree of Civil Court of Coimbatore in appeal 129 of 1852. Str. Man. § 233. But though the members may bind themselves by a *Kararnamah* not to sell family property, such an instrument is not binding on their heirs. *K. Venkatarama Sastrulu* v. *Brammana Sastrulu.* 4. Mad. Jur. p. 406. So where one member is called on to defray a debt or charge due by the family, he is entitled to sue the others for contribution; *f*) though it has been ques-

(a) Nareda. Sutras. 38 and 42. W. and B. 356. and 367.
Vrihaspati. II. Dig. B. V. Ch. VI. V. 389.
Dayabhaga. Ch. XIV. 7, 8 and 10.
Mit. Ch. II. S. XII. 3.
Vyavahara Mayuka. Ch. IV. S. VII. 27.33.
Smriti Chandrika. Ch. XVI. 3 to 6 & 16.

(b) Vide 178. (a).

(c) Vide 187. (a).
Vrihaspati. II. Dig. B. V. Ch. VI. V. 378.

(d) Vide (c).

(e) Nareda. II. Dig. B. V. Ch. VI. V. 387.
Yajnyawalkya. II. Dig. Ch. IV. V. 140.

(f) Nareda. I. Dig B. I. Ch. V. V. 99. 181.
Catyayana. do. V. 184.
Menu. IX. 218.

tioned whether the form of suit must not be for a division, with a prayer for an account of what is due from the other members by way of contribution. So members of an undivided family may agree among themselves to repay any advances which one member makes for family purposes.(a) *Mootoosawmy Gaunden* v. *Soobramanya Gaunden*. 1. Mad. Ct. R. p. 309. There the Court said, "The members of this family, though undivided in property, have, it appears, lived apart and occupied and enjoyed separate portions of the land in question and not the whole of it in common; and the plaintiffs are themselves parties to the agreement (No. 1) relied upon by the defendants, and must be taken to have entered into it with a full knowledge of its meaning and purpose. We have not before the Court the precise grounds upon which the agreement was come to; but it seems to have resulted from a mediation between the parties; and under the circumstances here, it is easy to suppose a state of things which would make such an agreement reasonable; and effect ought to be given to it as against the plaintiffs (parties to it) unless there is some rule of law which affects its validity. As a general rule no doubt, where undivided property is being enjoyed in common by the members of a Hindu family, money expended in the improvement or repair of the property, is considered as spent on behalf and for the advantage of all the members alike, and all have the benefit of the outlay when a division takes place. But there is no rule of law, that we are aware of, which precludes one member of an undivided Hindu family, though living together, from entering into an agreement with his co-parceners in respect of the expenditure upon the family property and re-payment of self-acquired funds; and such an agreement is rendered more reasonable and probable, where portions of the family property are occupied and enjoyed, as in this case, by each of the members living separately. There is therefore, we think, nothing illegal or unreasonable in agreement by which it was in effect stipulated that prior to division of the estate the defendants should be re-imbursed those sums which their father had laid out from his own private means, upon the land in his separate possession, and as their own contract, we must hold it to be binding upon the plaintiffs, and consequently the present suit, in which the plaintiffs set at nought the agreement and seek a division of the property contrary to its terms, cannot, we think, be maintained." And see *'Nub Koomar Chowdry* v. *Jye Deo Nundee*, 2. S. D. A. Rep. 247 : 1. Morl. Dig. 606 § 4 : 1. Strange H. L. 199 : 2 Ibid. 336, 343,346 : 1. Coleb. Dig. 283 : *Goluknauth Bose* v. *Rajkissen Bose* Fult. 401 : *Special Appeal* No. 37. of 1860, M. S. D. 1860, p. 16. 2. Macn. Pr. p. 162. 2. Wyman. p. 262. And see *Kalika Sahoy* v. *Gouree Sunkur*. 12 Suth. c. r. p. 287.

Division of the income is quite consistent with a *status* of undivi-

(a) Nareda. II. Dig. B. V. Ch. VI. V. 387. Yajnyawalkya. II. Dig. Ch. IV. V. 180.

sion as to the *corpus*.(a) *Sonaten Bysaik* v. *S. Juggatsoondree Dossee*. 8. Moore's I. A. p. 66. Where members of a Hindu family are so far separate in estate that each collects his *quota* of rent separately, there is no reason why one of them should not make over, either in exchange or sale, his right of receiving a part of the rents.(b) *Kalika Sahoy* v. *Gouree Sunkur* 12. Suth. c. r. p. 287.

Where property has been purchased by a father from *profits* of family estate, it is itself family property(c) In *Shudanund Moheputhur* v. *B. Doss Moheputtur and others*. 6. Suth. c. r. p. 256. s. c. 2. Whm. 308. (*nomine*) *Sudamund Moheputhur* v. *Mt. Soorjee Money Day and others*. *Steer J. and Trevor J. dissent : E. Jackson J.* drew a distinction between a joint family consisting of father and sons; and one where all were brothers. Where family property has been sold, and re-purchased by one of the joint-family, the presumption of non-division continues, as though the property had never been sold. *Gooroo Pershaud Roy* v. *Deebee Pershaud Tewaree*. 6. Suth. c. r. p. 58.

In the recent important case of *Nt. Josoda Koonwar* v. *Gouree Byjnath Sahae*. 2. Wym. c. r. p. 154, s. c. 6. Suth. c. r. p. 139, the question of what was *sufficient* evidence of a *status* of separation was much considered.

This is a dangerous state of things for parties dealing with a Hindu family; but it will be found that two great maxims of the law will prove a guide to the decision of most cases. First, *Caveat Emptor*: secondly, that no man shall take advantage of his own wrong.

Bearing these important observations in mind, let us see how they have been applied in the decided cases.

Where the existence of *joint*-property is admitted, the presumption is that all acquired property belongs to the family, unless indeed it can be shown that the joint estate was so small, that after providing for the maintenance of the family, nothing remained to form a fund for the purchase of other properties for the benefit of the family fund. This point often arises in practice, in that numerous class of cases, in which the members of a very poor family have migrated to the Presidency capital, and, after years, one brother has amassed property, while the others have continued paupers. In such a case, the drones not unusually strive hard to get into the hive of the worker; either on the plea that they have contributed by their labour to the creation of his fortune; or that the foundation of his success in life was the employment of family funds.

Two cases will illustrate this state of things. *In Tara Churn Mukerjee* v. *Joy Narrain Nookerjee* 8. Suth. c. r. p. 226, the defendant was held bound (*Jackson J.* dissenting) to show that family funds had in no way formed the *substratum* of his fortunes, which the Plaintiffs claimed as joint-family property, and which

(a) Mit. Ch. I. S. I. 4.
Subadhini and Balambhatta do. note.
Dayabhaga. Ch. I. 8 and 9.

(b) Dayabhaga. Ch. I. 9.
(c) Mit. Ch. I. S. IV. 29.
Dayabhaga, Ch. VI. S. I. 23.

he asserted to be his self-acquisition. There, the evidence showed that the money earned by the Plaintiffs, though small in amount, was always credited to the Defendant in his own books, and that the earnings of all formed one general fund. Further; certain expressions in the Defendant's letters were held to evidence the interest of his brothers in the business he was carrying on. "We are warned by Mr. Doyne," said *Markby J.* "that, if we laid down a strict rule as to the necessity of members of a Hindoo family making it perfectly clear in their transactions, whether they were acting on their own account, or for the general benefit of the family, it would lead to this that, as soon as one member of a family wanted to work for himself, he would be obliged to separate altogether, and that there would be an end of that mutual confidence which is so favorable a feature of Hindoo families. In this expectation I dare say, Mr. Doyne is perfectly well-founded. I have no doubt that, as soon as it is clearly ascertained that one member of the family is working for himself, and not for the common benefit, that member ceases to hold the same intimate relation with the rest of the family that he did before. But any evils which result from this loosening of the family tie, are consequences of the act of self-acquisition, which must be discovered sooner or later, and they will be in no way mitigated, but, as I think, greatly increased, if we encourage a member of a joint-family to conceal his real position, and, though apparently working for, the family, to turn round afterwards and say he was working for himself."

With this case compare *P. Chellapermaul Pillay* v. *P. Verapermal Pillay*. 4. Madr. Jur. p. 239. This was an appeal from the decision of the Ch. Justice. The Plaintiff sought to obtain a half-share, as undivided, cousin in the large fortune made by the Defendant and his father. It appeared that the Plaintiff's and Defendant's father were the sons, of an inhabitant of Pondicherry, who died there some forty years ago, after which the sons migrated to Madras. It was endeavoured on the part of the Plaintiff to show that there had been family property, though small, at Pondicherry, which had been sold, and the proceeds brought to Madras by the brothers, where they traded jointly. The plaintiff alleged that after his father had retired from Madras to live and die at Pondicherry, where, he said, he was maintained by the defendant's father, the plaintiff continued to reside with the defendant and his father, assisting them in their business, and from time to time proceeding on their behalf to Cuddapah, for the purchase of their indigo. The case entirely broke down. The existence of any remnants of family property at the date of the migration was not established; nor was the alleged joint-trading. No single fact was brought forward to show joint transactions, and not a letter of business or friendship during the whole of the period. It was, fortunately for the defendant, not shown that he or his father had maintained the plaintiff's father, or had contributed in any way to the ceremonies

or necessities of the other branch; though it appeared that the plaintiff and his father had occasionally paid visits to Madras, on which occasions they put up at the defendant's house. Any exhibition of such politeness, any kindness, charity, or other pecuniary liberality on the part of an undivided Hindu acquiring independent property, is highly dangerous, and like the Attorney's love-letter should always be "without prejudice, and given under protest;" or he may smart for it. In the present case the drone was worsted, though the worker had a very narrow escape.

Illegitimate sons of a Christian father by different Hindu women, although by agreement they constitute themselves parceners in the enjoyment of their property after the manner of a Hindu family, are not a joint-family according to Hindu Law. *Myna Boye* v. *Ootooram.* 2. Suth. P. C. p. 4. s. c. 8. Moore's I. A. p. 400.

It was said by P. Council in *Appoovier* v. *Rama Suba Ayen* 11. Moore's I. A. p. 75. that according to the true constitution of an undivided Hindoo family, no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property, that he has a certain definite share.

Managing Member.—One of the chief and necessary incidents of the *status* of a joint undivided Hindoo family is that some *one* member should manage ostensibly and in reality on behalf of all. Usually this duty devolves upon the eldest male, though not necessarily;(a) for where there exist disqualifying causes in such a one, another may be selected and appointed to the task. See 2. Macn. p. 148.(b) who writes thus:

"It should not be supposed, from the doctrine laid down in this case, that according to the Hindu Law, it is a settled maxim, that the eldest son is alone entitled to manage his father's estate, and that the other sons are to be debarred from the management. The law authorizes a capable son, whether he be eldest or youngest, to manage the estate; but if each son claim his share of management, he is competent to do so. A son who is capable may assume the management, with the consent of the rest, during the father's absence, or at his death, as appears from the subjoined extract of the *Dàyabhága*: 'Is not the eldest son alone entitled to the estate, on the demise of the *co-heirs*? and not the rest of the brethren? Not so: for the right of the eldest (to take charge of the whole) is pronounced dependant on the will of the rest. Thus *Nareda* says: "Let the eldest brother, by consent, support the rest, like a father; or let a younger brother, who is capable, do so: the property of the family depends on ability. By consent of all, even the youngest brother, being capable, may support the rest. Primogeniture is not a positive rule." See also 2. Str. p. 335. *Vencatákrishnyengar* v. *Narayen*

(a) Menu. IX. 106.
Dayabhaga. Ch. I. 37 and 42. Ch. III. S. 1. 15.
Smriti Chandrika. Ch. I. 28. 29.

(b) Nareda Sutra. 5. W. and B. 351.
Dayabhaga. Ch. I. 37 and 42. Ch. III. S. 1. 15.
Smriti Chandrika. Ch. I. 28 and 29.

ib. 336. *Kistnyengar* v. *Srenevasyengar*. ib. 338. *Latchmenada* v. *Visvanada*. ib. p. 339.

But a manager would not be removable simply on the ground that some other member of the family would discharge the duties of the office better. It is so in the case of a manager for an infant appointed by will. *A fortiori*, where the manager takes as the eldest male member of a family. See *Moodoosooden Singh* v. *The Collector of Midnapore and others*. 1. Marsh. p. 244. in a spendthrift is not competent to act as manager, and may be removed on that ground. *Pully Kundy Mucky* v. *Pully Kundy Koonjoossa*. 2. Mad. Sel. D. p. 55.(a)

The powers of a managing member have been much considered in many cases. In *Hoonoman Persaud Panday* v. *Mt. Babooee Munraj Koonweree*. 6. Moore's I. A. p. 393, the powers of the manager for an infant were laid down. See this case. *supra* p. 120-22, under he head of *Minority & Guardianship*. The rules which govern the relations of a guardian and infant are in the main much the same as those which obtain in the relation of manager and members of a joint-family; especially when, as very ordinarily happens, some of those members are themselves infants. It must be borne in mind, however, that members, *sui juris* may consent; and their consent, under certain circumstances, is presumed; whereas, an infant is incapable of giving his consent, so as to render a transaction done on his behalf by a managing member, binding upon and effectual against him, if it be to his prejudice, or not for his benefit, or not matter of absolute and unavoidable necessity. See this distinction taken in *Tandavaroya Mudali* v. *Valli Ummal*. 1. Mad. H. Ct. R. p. 398. (*supra* p. 122.)

In *Luchmun Kaour* v. *Mudaree Lall* N. W. P. R. for 1850 case 35, it was held that, a sale by the head of a family, during the minority of sons or brothers-in-law, for their support, religious ceremonies, or other pressing necessity, is valid.(b)

So in *Trimbuck Anunt* v. *Gopallshet bin Mahadshet Mahadoo*. 1. Bomb. H. Ct. R. p. 27, it was held that, if a person, dealing with a Hindoo representing himself to be the representative and manager of an undivided family, comprising infant members, can show, that after reasonable enquiry he believed in good faith that the person so representing himself, was entitled to act, and was acting for the family, and that the transaction entered into with him by such manager, was entered into for some common family necessity, or for the benefit of the infants, such act of the manager is valid and binding on the minor members of the family.

There *Sausse* C. J. said;

"The question presented for the decision of the Court is, upon whom rests the onus of proof as to the legality or otherwise of the alienation by defendant Gopall, of the infant defendant Mahadoo's share in the house in question? It was insisted that it lay not upon the purchaser, but upon the minor

(a) Mit. Ch. I. S. VI. 10. Vyasa. I. Dig. B. II. Ch. II. V. 6.
(b) Mit. Ch. I. S. I. 28. 29. Ch. IV. V 55.

who questions the validity of the sale. The plaintiff claims the house by virtue of a deed of conditional sale executed in his favor by the defendant Gopall: his nephew Mahadoo a minor, represented by his mother Satyabhamabaee, resists that claim on the ground that the transaction was collusive, and one beyond the power of Gopall to effect. The judge has also held that the transfer of the minor's share is invalid, as it was not shown to have been made for any of the purposes set forth in the Shastras. We consider however that the judge has not correctly framed the issues for trial, and that the case must go down for re-trial.

"It seems to us clear that where there is an undivided Hindu family comprising infant members, there must of necessity be some person to manage its concerns, and if the manager sell family property to carry on the trade, if such an act be necessary and for the general good, it will be valid. This is a case in which the manager sells the family house. It is an act of a very strong character, and according to the Shastras some strong necessity must be shown to justify it. No sufficient exigency has been made out upon the case as it stands: but we do not think it has been properly investigated, and will therefore reverse the decree of the District Judge, and remand the case for re-trial.

"The effect of this decision will be, that if the plaintiff after reasonable enquiry did in good faith believe that Gopall was manager, and wanted the money for family purposes, he will be entitled to recover. A purchaser from a manager is only bound to enquire whether the money was borrowed for a legitimate purpose, and if satisfied that it was, he will be entitled to protection against the claim of any member of an undivided family who was a minor, when the transaction took place; the latter must be held bound by the acts of his manager."

See *Saik Moortey Doss Vencata Doss* v. *Pellay Chetty* 139. of 1858. Mad. S. R. p. 177.(a)

The manager is not generally a trustee for the adult members, though he may be so to a minor. in *Chuckun Lall Singh* v. *Poran Chunder Singh Roy* 5. Wym. c. r. p. 287. s. c. 9. Suth. c. r. p. 483. *Phear J.* said, "The substance of the plaintiff's claim is, that he seeks to make his brother account to him for, and in respect of, all property for a period of 36 years, during the whole of which he and his brother had been living in commensality and enjoying the property jointly in the Hindoo fashion; and he places his right to an account simply on the ground that his brother was all that time *Karta* of the family. The claim does, however, divide itself conveniently into three parts, namely, 1*st*, the claim for account in respect of the period of minority; 2*nd*, the claim for a moiety of certain cash received from another branch of the family by arrangement on a butwarah being effected with it in 1239; and, 3*rd*, the claim for account in respect of the time from 1247 to 1271.

(a) Vyavahara Mayuka. Ch. IX. 10.

"During this last period, the plaintiff was admittedly an adult member of the joint-family, living in commensality with his brother and enjoying the joint-property to an equal extent with his brother, except so far as the fact that his brother was *Karta* made any difference in this respect. Can he, under these circumstances alone, require his brother to furnish him the account he seeks? I think not. If he can, it must be because his brother stood during the period in the position of an agent relative to him, *viz.*, managed his property for him under some obligation of a fiduciary nature. But I think that this is not the correct representation, generally speaking, of the *Karta's* position relative to the adult members of the joint-family. It appears to me that the joint-family is, as regards the enjoyment of the joint-property, a single entity. As long as the members, who have, what may be termed, vested interests in the property, choose to continue in a state of commensality and in joint fruition and enjoyment of the profits of the property, they cannot be said to possess individually any several proprietary right other than the right to call for partition,—a right which they may alien. For proprietary purposes they exist as a whole, somewhat in the character of a corporation. They manage the property together, and the *Karta* is but the mouthpiece of the body, chosen and capable of being changed by themselves. The family may in this respect be likened to a committee with the *Karta* as chairman. No doubt, in practice, the members of the family often do leave pretty nearly every thing in the hands of the *Karta* and under his control, but this is in most cases the result of the respect wich seniority in age and generation is apt every where to engender, and most especially in the case of a Hindoo joint-family. When it takes place, it is a willing abdication of personal care and supervision. It is not a distinct agency or delegation of a separate authority: each member may still at all times interfere if he chooses. And he may always insist upon division if he is dissatisfied with the management. Even where the members of the family apparently leave the most unrestricted power in the hands of the *Karta*, it is, I believe, usual to hold a family conclave at least once in the year to confirm and approve of what the *Karta* has done and to discuss jointly what should be done hereafter as to the family affairs. I think, therefore, that unless something is shown to the contrary, every adult member of an undivided joint family, living in commensality with the *Karta*, must be taken as between himself and the *Karta* to be a participator in, and authorizer of, all that is from time to time done in the management of the joint-property to this extent, namely, that he cannot, without further cause, call the *Karta* to account for it. Of course, it may as a matter of fact be the case in a given family that the *Karta* is the agent of, or stands in a fiduciary and accountable relation to, one or more of the members. It would be easy to imagine a state of things under which he had become the trustee of the

property relative to his adult coparceners, or in which, by reason of his fraud or other behaviour, they or one of them had acquired an equity to call upon him for an account. All that I desire to say is, that in my judgment he does not wear this character of accountability merely because he occupies the position of *Karta*. And in the case before us, there is not only an absence of evidence tending to show that the defendant was, relative to the plaintiff, any thing other than an ordinary *Karta* of a joint-family living in commensality, but there is on the other hand ample to satisfy me that the plaintiff, now a man of mature age, has of late years, at any rate, taken an active part conjointly with his brother, the defendant, in the management of the joint-property."

He is not bound to account, like the member of a partnership. *S. M. Ranganamani Dasi* v. *Kaunath Dutt.* 3. Beng L. R, c. p. 1. There, *Markby J.* said, "I am clearly of opinion that, in the ordinary case of a joint Hindu family, the manager of the whole, or any portion of the family property, is not, by reason of his occupying that position, bound to render any accounts whatever to the members of the family. There is no analogy whatever in this respect between the members of a joint Hindu family, and the members of a partnership; each partner is the agent of the other bound, by his contract, to protect and further the interests of his co-partners, unless relieved from that responsibility by special arrangement; and each partner is entitled to consume, on his own account, no more of the partnership property than the share of the profits.

"If he exceeds this, he becomes immediately a debtor to the concern. But in a Hindu family, it is wholly different. No obligation exists on any one member to stir a finger, if he does not feel so disposed, either for his own benefit, or for that of the family; if he does do so, he gains thereby no advantage; if he does not do so, he incurs no responsibility; nor is any member restricted to the amount of the share which he is to enjoy prior to division. A member of the joint-family has only a right to demand that a share of existing family property should be separated and given him; and so long as the famly union remains unmodified, the enjoyment of the family property is, in the strictest sense, common; as against each other, the members of the family have no rights whatever except that I have mentioned, and the only remedy, for a dissatisfied member, is by partition."(a)

In that case an account was decreed; but on this ground, as explained by *Markby J.* "The ground on which I make a decree for an account in this case is, that I consider that the ordinary relations of a joint Hindu family were in this case some what modified; and that this business was carried on, not as a common family business in the strict sense, the profits of which were all to sink into the common family fund, but rather on the footing of a partnership, and upon the understanding that the profits, when re-

(a) *Dayabhaga Ch. VIII. 1. Menu. IX. 111.
Dayacrama Sangraha. Ch. IX. I.

alized, should be divided amongst the individual members in certain proportions; and that the other profits of the family property, and the expenses of each member, should be credited and charged, in like manner, in the name of each. It is not necessary to say that the balance, appearing in the name of each in the accounts kept upon this understanding, became his separate property so long as the family remained joint; but I think it was a special arrangement in this family that the accounts should be so kept; and that upon a division, the share of each member should be ascertained upon the footing of such accounts "(a)

But he can only deal with the family property for the benefit of the family. *Cundasawmy Pillay* v. *Maroodinayakum Pillay* Mad. S. R. for 1852. P. 19. (b)

In *Sakhawat Hosen* v. *Trilok Singh.* 5. Bengal S. D. P. 338 it was held that a managing member cannot alienate the family property without the consent of the other members.(c) But in *Prannath Doss* v. *Calishunkur Ghosal.* 1. Beng. S. D. p. 45, where a manager, unable in any other way to discharge a balance of revenue to the Zemindar, in a time of distress, and while in confinement on that account, executed without the assent or presence of the other sharers, a deed of sale of the joint property, to discharge the balance, the sale was upheld.(d) And in *Aushutos Dossy* v. *Moheschunder Dutt.* 1. Fulton 380, s. c. 1. Morl. p. 41. § 18 it is laid down that a managing member can bind the rest of the family by a mortgage, where the money is raised for family purposes, and *bonâ fide* so applied. See *acc. Goondoo Mahadeo* v. *Rambut Bin Baboobhut.* 1. Bomb. H. Ct. R. p. 39.(e)

Where the other members of a joint family are insane, the managing member may, by reason of their incapacity, exercise his power of alienation, in cases strictly of necessity.(f) So in *Goureenath and another* v. *Collector of Monghyr and others.* 3. Wym. c. r. p. 45. s c. 7. Suth. c. r. p. 5. the Court said; "The next Appeal (No. 209) arises on a claim to set aside a sale which took place in the year 1859 of an 8 annas share in the Talook Gudee Sumria to the defendant Shumboonath Suhaye. At this time it is admitted that both Manick Ram and Salgram were lunatics, and on the face of the deed of sale Rughoobur avowedly acts as their "guardian." It is asserted, and we agree with the Principal Sudder Ameen in believing, that the sale was made to satisfy a decree for an ancestral debt which the decree-holder was about to execute against the property; and that the sale was one which a prudent person having management of the property would have sanctioned. The result of the award which we have upheld was to vest in Rughoobur and his bro-

(a) Yajnyawalkya. I. Dig. B. II. Ch. III. V. 6. Vyavahara Mayuka. Ch. VIII. 3.

(b) Menu. IX. 111 and Sancha and Lechita. II. Dig. B. V. Ch. I. V. 9. Mit. Ch. I. S. 1. 27, 28, 29, S. VI. 10. Vrihaspati. I. Dig. B. II. Ch. IV. V. 18. Vyasa. I. Dig. B. II. Ch. II. V. 6. Ch. IV. V. 55.

(c) Vyasa. I. Dig. B. II Ch. II. V. 6.

(d) Vyasa. do Ch. IV. V. 55.

(e) Vyavahara Mayuka. Ch. IX. 2.

(f) Mit. Ch. I. S. 1. 28 and 29.

thers a joint estate in a certain share of the ancestral property, and of this property Rughoobur was the manager. It is true that he describes himself as "guardian," which he could have no pretence in a legal sense to be. But we think this misdescription is immaterial; and that the question is whether, as manger, Rughoobur had power to dispose of the property for the purposes above stated. Baboo Dawrkanath Mitter, who argued in support of the purchase, could quote no direct authority in his favor; but he relied on a passage in Colebrooke's translation of the Mitacshara, where it is said (page 257, para. 28), "even "a single indivdual may conclude "a donation, mortgage, or sale of "immoveable property during a "season of distress for the sake of "the family, and especially for "pious purposes." In para. 29, "it is said the "meaning of the "text is this: while the sons and "grandsons are minors and in-"capable of giving their consent "to a gift and the like; or while "brothers are so and continue "unseparated; even one person, "who is capable, may conclude a "gift, hypothecation, or sale of im-"moveable property, if a calamity "affecting the whole family re-"quire it, or the support of the "family render it necessary, or "indipensable duties, such as the "obsequies of the father or the "like make it unavoidable." It is true that no express mention is here made of lunatics; but it may be argued with considerable force that the *text* of the law is general, and relates to every kind of incapacity; and that the mention of minors in the *gloss* is merely by way of illustration. Moreover, it was admitted on the argument that a manager of a joint-estate would have a power of alienation in such a case, if his joint owners, though capable, were absent, a power which can hardly be supported upon general principles of agency. There is a good deal, therefore, to show that the principle that the incapacity of joint owners confers powers of alienation in certain cases of necessity upon the managing owner is general, and in the absence, therefore, of any distinct authority upon the matter, we ought to affirm the validity of the alienation in this case."

He may sell *part* of the family estate in cases of need.(a) *Ramiah and another* v. *Kantaya and others.* Mad. S. R. for 1859. p. 142. *Ramakuti Ayar* v. *Kulaturaiyan* Ib. p. 270. *Hunnomanpersaud Pandaya* v. *Mt. Babooee Munraj Koonwar* 6. Moore's I A. p. 393. (See this Case considered under title *Minority* and *Guardianship*) *Mullar Sing and others* v. *Modhoo Dyat Singh* 3. Wym. c. r. p. 28. See *Goorumcondah Ranmaurau* v. *Yallah Yellumanidoo* Sp. A. 1 of 1855, Mad. S. R. for 1855. p. 61. *Doe dem Sacaram Sadasewsett* v. *Laxumbai.* Perry O. C. p. 129. And he may sell *all* the estate for necessity sake. (b)2. Macn. p. 301. He may mortgage for necessity.(c) *Goondo Mahadoe* v. *Rambhut Bin Bhaboo but* 1. Bomb H. Ct. A. p. 39. He must not sell more than enough to meet the necessity; though this rule does not apply where the excess is small, or the

(a, b, c) Mit. Ch. I. S. 28. 29. S. VI. 10.

money cannot otherwise be raised. *Baboo Luchmedur Sing* v. *Ekbal Ali*. 8. Sutherland c. r. p. 75.(a) See *Rajram Tewaree* v. *Luchmun Pershaud* 12. Suth. c. r. p. 478, where it was held, that if a larger sum was borrowed or raised than was legally necessary or a larger portion of the estate mortgaged or sold than was necessary, to raise the sum legally necessary the vendees or mortgagees would be entitled to a charge upon the lands mortgaged or sold to the extent of the money required and taken up for purposes recognised by Hindoo Law.(b) Want of acquiescence by the son, in a sale by his father, not for necessity, will invalidate the sale according to the *Mitacshara*. *Kulur Singh* v. *Moodoo Dyet Singh*. 5. Wym. p. 29. There the Court said, "with regard to the first objection, the Principal Sudder Ameen found, on the evidence, that there was no legal necessity for selling the land. The reason alleged for the sale is that by it the plaintiff's father was enabled to redeem a mortgage of 300 beegahs of land. But even if we grant, for the sake of argument, that this was an advantageous transaction, it cannot be contended that it was necessary, for the Zuripesghee term did not expire for three years, and the money advanced could not have been demanded till that time had expired. There was no claim in this respect on Sreekishen, and no necessity whatever for his parting with his ancestral property.

"It has been argued by Mr. Gregory, for the special appellant, that a son cannot annul a sale made by his father unless he proves that the latter has wastefully sold it; and we have been referred to a decision of this Bench in support of the contention.

"The case quoted is to be found in Vol. I, Weekly Reporter, 96, *Bishambur Naick*, plaintiff, appellant, *versus Sudasheib Mahaputtur* and others, defendants, respondents.

"We do not see anything in this decision opposed to the view we are now taking. In it we quoted from the Mitacshara (Chapter I. Section 5, paragraph 10, page 279) to show that a son had power to interdict sales made wastefully, but not to interfere when the sales were made for pressing necessities, and for the maintenance of the family. It did not follow from this, nor did we mean to lay it down, that the son could only interfere in cases of waste, for the Section of the Mitacshara quoted says distinctly that, the son must acquiesce in the father's disposal even of his own acquired property."

"Had the sale of these 40 beegahs been proved to have been made for either of these reasons, we should have held now, as we did then, that such sale could not be void." The same is the Law in *Mithila*. *Sheo Pershad Jah* v. *Gunga Ram Jah*. 5. Suth. c.r. p. 221.

It is unncessary to repeat the observations with respect to the maxim "*Caveat Emptor*," which have been considered under the head of *Minority* and *Guardianship*. They will be found generally applicable to the relations of

(a) Vyavahara Mayuka. Ch. IX. 6. 10. Menu. Ch. VIII. 165. 167.

(b) Menu. VIII. 167.

Manager and Purchaser. In *Hunommanpersaud Pandy* v. *Mt. B. Munraj Koonwar.* 6. Moore's I. A. p. 393, it was said that no general rule can be laid down upon whom the *onus* lies to allege and prove the *bonâ fides* of a Manager of an estate whose title to alienate is qualified, in contracting debts and resorting to loans: the presumption proper to be made varies with the circumstances, and is regulated and dependant upon them. See also *Lewis Cosserat* v. *Sudaburt Pershaud Row.* 3. Suth c. r. p. 210. There the Court said; "Then, as to these "equities" the appellants plead that they treated with persons who dealt with the property as their own, and who were heirs of another person who had in his life-time dealt with the property in like manner; that all the world were deceived into supposing that Mouzah Chataslee was the separate property of Bhugwan Lal; and that therefore, appellants were justified in advancing their money upon it. Cases have been cited, notably that of Honooman Pershad decided by the Privy Council to show that *bonâ fide* purchasers for value, where the property had for a long series of years been treated by the vendors as their own, were protected.

"None of these cases, however, are of a like nature with this. No doubt, where estates are held benamee, and the benameedars have, for a series of years, given themselves out as the real owners, and have exercised all the rights of ownership, a *bonâ fide* purchaser for value without notice would, in accordance with the precedents quoted, receive an equitable consideration; but this case is, in our opinion, very different. The mortgagors were widows, a circumstance in itself that ought to have made the appellants cautious. By the *Mitacshara* Law, which prevails in that district, widows have no part in their husband's joint estate, and the fact of Bhugwan Lal's having treated the Mouzah of Chataslee as his own, so far as to mortgage it during his life-time, was not a sufficient reason, we think, for prudent men to jump at once to the conclusion that the Mouzah was the separate property of Bhugwan Lal, and, as such, descended to his widows. Many cases might be cited where one member of a family is the only apparent owner, and has conducted in his own name all the joint transactions; and it has been frequently held that the mere fact of a person treating property as his own, is no sufficient proof of absolute and separate ownership."(a)

In *Gour Chunder Biswas and others* v. *Grush Chunder and others.* 7. Suth. c. r. p. 120, it was laid down that the mere fact of the name of the managing member of a joint Hindoo family standing as the recorded proprietor of an estate, is not *per se* sufficient to give title to a purchaser for valuable consideration from him,(b) unless at the time of the purchase, the purchaser was ignorant of the real state of the family, and was really led by that circumstance to believe that the record-

(a & b) Menu. IX. 105.

ed proprietor was the sole owner.

Where one member of a family is allowed by the others to hold himself out ostensibly as the sole owner, parties dealing with him on that footing will not be called on for the "strictest proof," to rebut the ordinary presumption of joint-property. So an auction purchaser was relieved in *Lallah Shreedhur Narrain* v. *Lallah Modho Persaud*. 8. Suth. c. r. p. 294. (See s. c. 6. Suth. c. r. p. 70.) In *Baboo Luchmeedur Singh* v. *Ekbal Ali*. 8. Suth. c. r. p. 75, where a joint family property was sold in order to raise money to redeem other property which had been mortgaged and was about to be fore-closed, and there was nothing to show that the transaction was not for the benefit of the family, the sale was declared to be good: and it was held that, as a large sum was due on the mortgage, the purchaser was not bound to enquire into the original necessity for giving the mortgage.

The Courts will never allow members of a joint-family to take advantage of their *status*, to defraud parties dealing with them.(a) When therefore, being aware of the transaction with the manager, or one of their body ostensibly appearing as the owner, they lie by, they will be bound. This point arises not unfrequently in *Benamee* transactions. A good illustration is afforded in the case of *Sasachella* v. *Vencatachella* 2. Str. N. of C. p. 159. Ib. 1. Morley p. 454. § 22. 23. So in *Comarah* v. *Permall*. 2. Str. N. of C. p. 160. Ib. 1. Morl. p. 454. § 24. the Court refused an injunction because the other members were privy to the transaction. In *Shama Churn Chatterjee* v. *Tarucknath Mookerjee*. 5. Suth. c. r. p. 105, it was held that a nephew who is living with, and has always acted as agent of his uncle, the manager of a joint-family, cannot repudiate a mortgage by the uncle without proof or denial that the money so received by the uncle was not applied by him towards the expenses of the joint-family.

A purchaser from a wife, where the husband is alive, without making inquiry, is not b. f. without notice. *Bindabun Chunder Saha* v. *Janee Beebee*. 6. Suth. c. r. p. 312. s. p. *Bindoo Bashinee Dabee* v. *Peary Mohun Bose*. 3. Wym. c. r. p. 29.

In *Mt. Bhoorun Koer* and others v. *Sahebzadi and others*. 6. Suth. c.r.p. 149, the Plaintiff's sued to set aside certain sales made by their father, according to the *Mitthila* law jointly interested with them in the property, who they alleged had inherited large property, had given himself up to luxury and immorality, and dissipated the whole of the property, whence the origin of the sales. The Purchaser pleaded that the sales were made to meet expenses which the father was justified in incurring. On appeal, the Court said, "The appellant before us has not denied that the above sales were made ostensibly for the purposes which the defendants allege, but he contends that this evidence is insufficient; he maintains that the defendants ought to go further

(a) Menu, IX. 165, Vyavahara Mayuka, Ch. IX. 10.

and shew the nature of the debts for which the decrees were obtained, and the necessity of selling the property in order to meet these and other debts incurred. He asserts that the alleged necessity of these sales is a mere pretext to cover the father's extravagance.

"Upon this, a good deal of discussion took place as to the precise limits to which each party is bound to carry his evidence, and the exact presumptions which ought to be made in a case like the present.

"With regard to the law, it is clear, from the case of Honooman Pershaud Pandey *versus* Mussumut Babooee Munraj Koonwaree (6 Moore's Indian Appeals 393), that a purchaser in a case of this kind does not take upon himself the entire risk of the existence of a case of necessity for alienation. It is there said that the lender (or purchaser, as the case may be—the same rule would apply) 'is bound to enquire into the 'necessities for the loan, and to 'satisfy himself as well as he can, 'with reference to the parties 'with whom he is dealing, that 'the manager is acting in the 'particular instance for the bene-'fit of the estate.' And further it is said, 'their Lordships do not 'think that a *bonâ fide* creditor 'should suffer when he has acted 'honestly and with due caution, 'but is himself deceived." That was the case of a widow in possession of her husband's property, and having an infant son;—the present case is at least as strong of the purchaser.

"In the same case, speaking of the *onus probandi*, their Lordships remark that the question on whom the *onus* of proof lies in such suits is one not capable of a general and inflexible answer, and that the presumption proper to be made will vary with the circumstances, and must be regulated by and dependent on them.

"Now, applying the above remarks to the present case, and viewing this case, as the Privy Council say it ought to be viewed, according to its particular cirumstances, we think the defendants have given sufficient evidence to raise presumption in their favor that the purchases made by them are valid. There is not a suggestion that they acted otherwise than *bonâ fide*; the alleged extravagance on the part of the father is not proved, and there appears to have been nothing to call for more than ordinary caution on the part of the purchasers. On the other hand, it is shewn that circumstances of grave suspicion attach to this case, that it is promoted by the father to serve his own interests. We also find that a very large proportion of the purchase-money was required to satisfy decrees in respect of which the whole of the joint property had been attached, and that a sale was imminent. For nearly the whole of the remainder, the ostensible necessity was that arising out of debts incurred in carrying on the litigation referred to, and there is nothing apparently unreasonable in the amount said to have been required for this purpose. The only remaining item is that of the *shrad* expenses which, as we have already said, the father had a right to discharge."

See also *Mt. Nowruttun Koer* v. *Baboo Gouree Dutt Singh*. 6. Suth. c. r. p. 193. *Baboo Konto Lall and*

others v. *Baboo Greedharee Lall and others.* 5. Wym. c. r. p. 266, where it was held that only pressing necessity can justify a father in alienating joint-family property during the minority of his son; (a *Mitthila* case) and the Court in deciding as to such necessity, will not be content with being shown merely that decrees existed against the father, but will inquire how the obligations, on which those decrees are based, came to be contracted. There the Court said;

"However repugnant at first sight it may appear to principles of Justice and Equity that the sons should be allowed to recover landed estates which the fathers have sold, still if the right of the father to sell any portion of such estate can be questioned under the law, and the right of the son to a portion of such estate is clear, under that law, the sons must recover. There are certain circumstances in this case which go to show that the purchasers from the father were aware that their title to the estates they purchased was not a valid title the purchasers having allowed some of the estates to fall into arrears of Government revenue, and having re-purchased them under a new title, hoping thereby to cover the defects of the title gained by the first purchase. If the defendants were then acquainted with the defect in their title, and purchase with such knowledge, there can be little doubt that the consideration for such purchases was proportioned to the risk they ran as to title being afterwards declared invalid. There seems to be no sufficient evidence that the money for which the estates were sold was, as alleged by the plaintiffs, expended in immoral purposes. There is no distinct evidence as to what was the income of the Plaintiff's father. One of them is said to have been a Sheristadar in the Purnea Civil Court. It is not even stated in the evidence whether the whole of the landed estate has been dissipated; but it has been in the argument before us mentioned, that that has been the effect of the sales; so much so, that even the family house has been disposed of; and there has not been any direct contradiction of the fact by the pleaders of the defendant. Several of the sales which have taken place have been in execution of decree, the decrees only showing that the father had incurred debts. The purchasers, defendants, allege that the existence of these decrees is sufficient to support their case that there was a necessity for the sale; that they cannot be required to go behind the decrees, and the facts apparent on the face of the litigation and to point out the exact mode in which the sums borrowed by the fathers were spent. In favor of this contention, we are referred to a decision of the Sudder Court, and to a precedent. (Wyman's reporter Vol. II. page 164, *Mussamut Bhoorun Koer and others.* s. c. 6. Suth. c. r. p. 149. *supra.* 196.) It seems, by the last decision, that the Judges did not consider the existence of the decrees alone to be a sufficient justification for the sale. They went on to look to the rest of the evidence regarding the sales, and came to the conclusion that the father and the purchasers had both acted *bonâ fide,* and that the

money for which the sales were ultimately incurred was not spent in dissipation and extravagance. But there was in that case evidence that large sums of money were required for special purposes for the benefit of the family. There is no evidence to that effect in this case. The purchasers in that case were therefore able to justify their purchases, not only on the ground of the decrees, but also upon other evidence. As to the decrees in this case, they certainly afford no sufficient evidence as to the necessity of the sales by the fathers of their sons' interests in the property. The purchaser at a sale in execution of decree purchases only the rights and interests of the person whose property is put up for sale. If his interests are limited except under certain contingencies, the purchaser must be prepared to prove those contingencies, if he is desirous to make out that under the sale anything more than the interest of the debtors passed to him. In the present case there is no evidence to show that the father required to raise money for any pressing necessity for the benefit of the family. All that is proved is that the money was obtained from time to time far beyond the income of the parties and to that extent that the whole ancestral estate, as well as ancestral house, as ultimately alienated."(a)

In Rajaram Tewaree v. *Luchmee Persaud.* 12. Suth. c. r. p. 478. s. c. 4. Beng. L. R. c. r. p. 118, where Plaintiff on behalf of himself and his minor brother, as sons and heirs of *J*, deceased, sued to recover possession of certain lands being ancestral property, by reversal of certain deeds of absolute and conditional sale alleged to have been executed without any necessity, the deeds were executed by *J* and his brother *O*, but the plaintiff's claim was confined to the one-half share alleged to have belonged to his father *J*. The property was subject to the Mitacshara Law. It was held that if plaintiff's case were sustainable in other respects, it would be necessary to try the issue whether the persons who advanced the money did, after due enquiry into the necessities of the father and uncle, act honestly in the belief that a sufficient necessity existed for taking up the money for the benefit of the family; that if a larger sum was borrowed or raised than was legally necessary, or a larger portion of the estate mortgaged or sold than was necessary to raise the sum legally necessary, the vendees or mortgagees would be entitled to a charge upon the lands mortgaged or sold to the extent of the money required and taken up for purposes recognised by Hindoo Law and that, where the plaint sought to set aside the deed *in toto*, on the ground that the whole of the money was used by the father for his own extrvagance, the Court might, upon the defendant's establishing a necessity for part of the loan, decree that the deed should be set aside, and the plaintiff recover possession, upon his paying the amount which was legally taken up for necessary purposes, or that the deed should

(a) Menu. Ch. VIII. 199. Catyayana. I. Dig. Ch. II. S. I. V. 25.
Mit. Ch. 1. S. I. 28 and 29.

be set aside in proportion.(a) There *Peacock C. J.* said, "I think it very doubtful whether the principle of upholding the deed as to that portion of the land which bears the same proportion to the whole quantity conveyed, as the money borrowed for and applied in discharging a legal necessity bore to the whole amount of the consideration-money, is a correct one. If a larger sum of money was borrowed or raised by sale than was required for a legal necessity, and a larger portion of the estate than was necessary for the purpose of raising the sum legally required was mortgaged or sold, the vendees or mortgagees, as the case may be, would be entitled to a charge upon the lands mortgaged or sold to the extent of the money required and taken up for purposes for which, according to the Hindoo Law, the plaintiff's father and uncle were entitled to alienate the estate during the minority of the plaintiffs. This was the principle upon which the Lords of the Judicial Committee of the Privy Council acted in regard to an estate sold by a Hindoo widow, and the same principle appears to be applicable in a case like the present,—*See* the case of the Collector of Masulipatam *versus* Cavaly Vancata Narainapah, VIII Moore's Indian Appeals, pages 500, 504 and 555. The same principle seems to have been acted upon in the case of Muddun Gopal Thakoor and others *versus* Ram Buksh Pandey and others, 6 weekly Reporter, Civil Rulings, page 71.

"It is unnecessary, however, to decide whether if an ancestor borrows 20,000 rupees when he is not justified in borrowing for the necessities of the family more than 10,000, and mortgages an 8 annas' share of the ancestral estate as a security for the 20,000 when he could borrow the 10,000, upon the mortgage of a 4 annas' share of the estate, the law may treat the mortgage as void as to a 4 annas' share and good as to the other four annas' share. It certainly is more convenient than compelling the heir to re-pay the 10,000 lawfully borrowed before he can set aside the mortgage as to any part of the estate, for the heir may be unable, pending the suit, to pay the 10,000 rupees, or even to borrow it upon the security of the estate, upon the chance of his succeeding. It may well be assumed in such a case that the share mortgaged was a sufficient security for the whole loan, and consequently that one-half would be a sufficient security for half the loan.

"In the case above cited from the Weekly Reporter, it was held that if any portion of the money borrowed by the ancestor was for purposes recognised by the Mitacshara Law as necessary, the plaintiff is not entitled to recover under a plaint which seeks to set aside the deed *in toto* and to recover possession upon the ground that the whole of the money was used by the father for the purposes of his own extravagance. See also the same case after remand, same reports, page 74.

"I am not, however, prepared to admit the correctness of that

(a) Vishnu. I. Dig. Ch. V. V. 192.
Catyayana. do. V. 193.
Nareda. do. V. 181.
Menu. Ch. VIII. 167.

ruling as regards the form of the pleadings. The plaintiff, to whom in all probability the circumstances under which the transaction with his father took place are not so well known as they are to the defendants, seeks to recover possession of the land alienated by his father by reversal of the deed of conditional sale. It was for the defendants to prove that a legal necessity for taking up the money upon loan existed, or that after due and honest inquiry they had reason to believe that such a necessity did exist. I see no reason why, in such a case, upon the defendant's establishing a necessity for part of the loan, the Court might not decree that the deed should be set aside and the plaintiff recover possession upon his paying the amount which was legally taken up for necessary purposes recognised by law, or that the deed should be set aside in proportion.

"In the case above referred to, of the Collector of Masulipatam *versus* Cavaly Vancata Narainapha, VIII Moore's Indian Appeals, page 555, the suit was to set aside an alienation *in toto* and to recover possession of a zemindary upon the ground that the vendor was a widow who had no power to alienate, and there was no offer to pay what, if any thing, might appear to be due for advances made to her for purposes for which, according to the Hindoo Law, she was entitled to alienate the estate (See page 504); yet the Lords of the Privy Council directed an enquiry as to whether any, and what, advances had been made to the widow for which, according to the Hindoo Law, she would have been entitled to alienate. It does not follow that they would not have set aside the deed as to a certain proportionate share of the estate, if there had been a finding that there was a legal necessity for raising one half of the purchase-money, but no legal necessity as to the other half.

"There are many other cases in the Courts of Equity in England in which the relief prayed for has been granted upon equitable conditions annexed by the Court, though the relief was prayed for absolutely. Thus, in Head *versus* Egerton, III Pere William's Reports, page 279, in a suit to compel the defendant to deliver up certain title-deeds to the plaintiff which he claimed as owner, the Court refused to order the deeds to be delivered up unless the plaintiff would pay the defendant certain money which was equitably due to him.

"In Towers and Davis, I Vernon, 479, the plaintiff filed a bill to compel the defendant to give up certain deeds which concerned his estate. Defendant refused to deliver up the deeds until her jointure was confirmed, the plaintiff insisting that the jointure was after marriage and was purely voluntary. But the Court refused to order the delivery of the deeds to the plaintiff except upon the terms of his confirming the jointure.

"If, therefore, this question depended merely upon the form of the pleadings, I should refer the case to a Full Bench.

"These cases stood over until after the decision of the Full Bench in the case of Sudabart Pershad Sahoo *versus* Foolbash Koer, and the analogous cases. Those cases have now been determined, See 12

Weekly Reporter, Full Bench Rulings, page 1, and it has been held that under the Mitacshara Law, one of several members of a joint Hindoo family cannot without legal necessity alienate any portion of the undivided ancestral property without the consent of the whole of his co-sharers, and that such alienation is not valid even for the share to which the alienor would have been entitled on partition."

In *Babaji Sakhoji* v. *Ramshet Pandushet*. 2. Bomb. H. Ct. R. p. 23, it was held in a suit brought by a Hindú son, for himself and on behalf of three infant brothers, to set aside a sale of certain ancestral lands, which had been made by his father without his concurrence, that the *onus* of proving that the payment of the debts, on account of which the property was sold, was not a common family necessity, was properly laid by the District Judge upon the plaintiff.

"We are of opinion", said the Court, "that in the present suit the District Judge has rightly thrown the burden of proof on the plaintiff, who disputes the validity of the sale effected by his father.

"By the decision of the Privy Council which has been cited the law on this subject has been enunciated as follows :—"The question on whom does the *onus* of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated and dependent on them." In the same judgment a '*dictum*' of the Agra Sudder Court in the case of *Oomed Rai* v. *Hiralal* (6 S. D. A. Dec., N. W. P., 218) to the effect that "if the '*factum*' of a deed of charge by the manager for an infant be established, and the fact of the advance be proved, the presumption of law is '*primâ facie*' to support the charge, and the *onus* of disproving it lies on the heir," is quoted; and it is declared with reference to it: "The dictum, then, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger. Consequently, this 'dictum' may perhaps be supported on the general principle that the allegation and proof of facts presumably in his better knowledge is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of

collusion between father and sons in fraud of the creditor of the father.

"Now the circumstances of the present suit are nearly identical with the case described in the judgment of the Privy Council. From the father's answers, when under examination, there is every reason to suspect collusion between himself and his sons to recover the lands from the purchaser; and the only difference between the two cases is that in the one the property has been permanently alienated, while in the other it was only incumbered, by the father. In the present case, too, there is the additional fact that the property was sold to satisfy decrees which had been passed against the father. It has been stated in the course of the argument that one of these decrees was obtained against the father as surety for some third person, and that it may be presumed that this liability at any rate did not arise out of any common family necessity. We do not think that we can equitably form any such conclusion. The circumstances under which the father became surety are wholly unexplained; and we consider that it was for the plaintiff to show that there was anything in the character and circumstances of the act which would exempt the family property from liability.

"We do not consider that the decisions in *Trimbuk Anunt* v. *Gopalshet* and in *Tàndavaràya Mudali* v. *Valli Ammal* militate with our present view. The circumstances of both of these cases are plainly distinguishable from the present suit; and, the principle being that the imposition of the burden of proof on the one party or the other will vary in accordance with the circumstances of each particular case, the course adopted in either of those causes is not one that we need necessarily follow in the present instance."

He cannot deal with the property for his own sole benefit.(a) *Labar Beethoma Endagatha Sanamby* v. *Vyapooratha Coonhy Pucky* Sp. A. 95 of 1856. Mad. S. R. for 1856 p. 205. See acc. *Sadabant Prasad Sahu* v. *Foolbash Koer*. 3· Beng. L. R. F. B. R. p. 31. *Nathoo Lal Chowdry* v. *Chedee Sahee* 12. Suth. c. r. p. 446, which was a case under the *Mitacshara*. But if he does, his share will be bound. *Pulanivelappah Kaundan* v. *Mannaru Naikan and another* 2. Mad. H. Ct. R. p. 416. See *Ramasawmy* v. *Sasachella* 2. Strange. N. of C. p. 74, and *Sutherland's* note p. 79. In *Goondo Mahadeo* v. *Rhambhut, Bin Baboobut* 1. Bomb. H. Ct. A. p. 39, a managing member was held to be able to validly mortgage his own share.(b) He can sell his own share.(c) *Damodhur Vithul Karee* v. *D. Hari Somana*. Ib. p. 182. He cannot borrow on a bond which does not recite the purpose for which the money was borrowed. [?] *Maharajah Juggunnath Sahee Deo* v. *Heera Ram Chuckerbutty* 6. Suth. c. r. p. 43. He may sue on behalf of the family.(d) *Garuda Venkaya* v. *Garuda Reddi*. Mad. S. A. for 1860. p. 175. The family is

(a) Mit. I. S. I. 27.
(b & c) Nareda. I. Dig. B. II. Ch. IV. 100. S. I. V. 6. Dayacrama Sangraha. Ch. XII. S. I. 9.
(d) Mit. on judicature 1. Macn. H. L. 163.

bound by his suit. And how far by his acts; see 2. Str. 269. 272. 273. 279. 282. 283. But see *Doe d. Sacaram Sadanund* v. *Luxmabai and others*. Perry's O, C. p. 129. And see the usual 'signs' of separation set out by W. and Bühl. 2. Introd. § 4. III. He shall not be allowed to plead that his act was *ultra vires*, to avoid his own conduct in fraud of creditors, purchasers, and the like.(a)

The powers of a Manager are further illustrated by cases arising out of the peculiar *status* of an undivided family under the *Maramookatayam* and *Alya Sultana* Laws on the Western coast of the Madras Presidency. There, the inheritance runs in the female, not the male line. A man's heirs are not his own sons, but his sister's sons. The family communities are called *Tarawàds*. The senior male, of whatever branch, is the head and manager of the family; and is called *Kàrnaven*; the other members are called *Anundravens*. On the death of a *Kàrnaven*, his senior relative, not the nearest in blood to him, succeeds. *Kunigaratu* v. *Arrangaden*. 2. Mad. H. Ct. R. p. 12. *Nambiattan Nambudri* v. *Nambiattan Nambudri*. ib. p. 110, and where a junior member manages, it is presumed to be with the consent of the senior, who may at any time intervene, and assume it himself. ib. In theory, property vests in females only, the males having the right of management, and claim to support. Practically, the males are co-sharers with the females. Str. Man. § 389. In default of males, females succeed to the management. In some families, the management devolves on females in preference to males; and in such cases the senior female succeeds. ib.

The causes which will disqualify the Karnaven are loss of caste, old age, deafness, blindness, dumbness, madness, disgraceful conduct, and dissipation of the family means. When put aside, whether by the family or by force of legal measures, he is to be replaced by the next senior competent male member. Str. M. § 386.

Let us now see what are the powers of a *Kàrnaven*. It is not intended to exhaust the cases on this special Law; but simply to select a sufficient number for elucidating the point at issue. In *Kunigaratu* v. *Arrangaden*. 2. Mad. H. Ct. R. p. 12, it was held that an individual *Anandraven* has no right to an account from the *Kàrnaven*. To make a sale of family property valid, the assent of all the members of the *Tarawád* is requisite; but that consent may be implied, when the instrument of sale is signed by the *Kàrnaven* and the senior *Anandraven*. Dissent must be proved by those who allege it. *Kondi Menon* v. *Sranginreagatta Ahamadda*. 1. Mad. H. Ct. R. p. 248. The Chief *Anandraven's* signature, though usual, is not indispensable. *Kapreta Ramen* v. *Makkaiyil Mutoren*. *Ib.* p. 359. The *Karnaven* can bind the *Tarawad* by his debt incurred on their behalf; and Tarawád land can be seized in execution, in a suit against the *Karnaven* on account of such debt. *Parrakel Kondi Menon* v. *Vadakentil Kunni Penna* 2. Mad. H. Ct. R. p. 41.

(a) Menu. Ch VIII. 165.

And where the members of a *Tarawàd* take possession of the estate of the deceased manager of the property, they render themselves responsible for the debts he had incurred in such management. *Chowcaren Orkattery Coony Ahmond* v. *Narsimmajee Mookthar.* Mad. S. R. for 1849 p. 17. *A Kàrnaven* can make an *otti*-mortgage without the signature of any of his *Anandravens.* In *Edathil Itti* v. *Kopashon Nayar* 1. Mad. H. Ct. R. p. 122. *Scotland* C. J. said, "The question raised is one purely of local usage. The plaintiffs contend that the fourth defendant, the karnaven of the first and second plaintiffs, had no power *singly* to create an otti-right; for that this in effect amounted to an absolute sale. If that were so, the objection would be well founded, for a sale of family property in Malabar requires that the senior Anandraven should (if sui juris) concur in the conveyance. But though after an otti-right is granted, little or nothing is left to the jumma proprietor, he has still a distinct right to redeem, and the transaction must therefore be regarded as a mortgage, and not as an absolute sale. If, then, an otti-right is a mortgage-right, a karnaven may singly create it for proper reasons, which, of course, we must assume to have existed in the present case."

As to *Otti* and *Kanàm,* see *Kumini Amma* v. *Parkam Kolusheri* 1. Mad. H. Ct. R. p. 261. *Ramen Nayar* v. *Kandapuni Nayar.* Ib. p. 445. *Mayavanjari Chumaren* v. *Nimini Mayuran.* 2. Ib. p. 109. *Shaikh Rauttan* v. *Kadangot Shupan.* 1 Mad. H. Ct. R. 112 *ib. ibi not. Pramatan Tupen Nambudripad* v. *Madatil Ramen.* Ib. p. 296. *Tiakandy Chatten* v. *Kanamolly Ramen Nair and others.* Mad. Sud. R. for 1857. p. 121.) Where, in *Ukanda Varriyar* v. *Raman Nambudri.* 1. Mad. H. Ct. R. p. 262 the Uralans of a devasvam wherefore tarawàds, it was held that a sale of the *Urayama* right by one *tarawàd* without the consent of the others, was altogether invalid; and that the vendee could not redeem a *kanàm* mortgage of the *devasvam* land, though the mortgagor was *karnaven* of the *tarawàd* which assumed to sell the *Uráyama* right. A *Karnaven* in possession of the family funds is presumed to have made all acquisitions with them, and for the benefit of the corporate body. But such presumption is not irrebuttable; and his alienation or charge of such acquisitions may be valid. *Kallati Kunju Menon* v. *Palat Erracha Menon.* 2. Mad. H. Ct. R. p. 162. The owner of self-acquisition may alienate it during his life. If he does not, it falls into the general property which those who succeed accept with it its obligations. In the case last quoted, *Mayne, arguendo,* cited an unreported case Sp. R. A. 373 of 1863, before *Phillips* and *Holloway J J.* to this effect, "Self-acquisitions of land by a member of a tarawàd are his separate property during his life, and may be charged by him for his personal debts. After his death they lapse into the tarawàd property, but if accepted by the members, they carry their obligations along with them:" and the Court said, "It is unquestionably the law of Malabar, that all acquisitions of any member of

a family undisposed of at his death, form part of the family property; that they do not go to the nephews of the acquirer, but fall, as all other property does, to the management of the eldest surviving male.

"It is, however, an unquestionable law that the acquirer is fully entitled to hold, incumber, and dispose, during his life-time, of his self-acquisitions. That doctrine, of the soundness of which we entertain no doubt whatever, was laid down by this Court in a case unfortunately not reported, and is unquestionably in accordance with usage, for, in all the reckless litigation of Malabar, one member of the Court with the judicial experience of several years does not remember an instance of a kàrnaven attempting to get into his own hands the self-acquired property of a junior member. That a kàrnaven, who is in possession of the family funds, will be supposed to have made all acquisitions with them, for the benefit of the corporate body, is unquestionable. It is also clear that it lies upon those who assert such self-acquisitions to make them out by the most satisfactory evidence; so strong is the presumption in the case of a kàrnaven against self-acquisition. When once established, however, we are perfectly satisfied that an alienation, charge or other disposition to take effect at once, made during his life-time, will be perfectly valid."

The same law prevails as to property acquired by any member of the *Tarawád*. *Primâ facie* it is joint. *Murikancherri Kuni Ahamad* v. *Chundanga Poyilil Avulla*. Mad. S. R. for 1859. p. 226. *A. Kàrnaven* cannot alienate the *Tarawád* property by will *Chowacaren Parria Parambat Mossa* v. *V. P. Coonjy Fatima*. Mad. S. R. for 1854. p. 227. A. *Stanom*-holder cannot alienate the property to the detriment of the family. *Manavicrema Nalam Rajah* v. *Soobramanyen Puttar*. Mad. S. R. for 1853. p. 214. Nor can he mortgage or charge it. *Ittapan* v. *Tilamatill Mattu Manadi*. Mad. S. R. for 1861. p. 19.

A. Kàrnaven may be superseded for incompetency. Strange's Man. § 386. (Decree of Civil Court of Calicut in A. No. 36 of 1848).

An instructive case will be found in 2. Madras Jurist p. 94. *Kollath P. M. Koran* v. *P. M. C. Nair* wherein it was held that a Tarwad Property is inalienable; that a karnaven is a mere trustee for the other members of the tarwad: that a alienation, however, is good on ground of adequate family necessity; but that the purchaser must make out that the purpose was a proper one: and that a voluntary alienation of the corpus, subject to the claims of all the members, to some of those members, cannot be upheld.

Power of individual members, other than manager, to alienate joint-family property.—Land acquired by means of ancestral property cannot be alienated by an individual member.(a) *Pedru Prabhu* v. *Domingo Prabhu*. Mad. S. R. for 1860. p. 8. A co-sharer has no right to do anything to the joint property which alters its condition, without the consent

(a) Nareda. I. Dig. B. II. Ch. IV. S. I. V. 4.
Vrihaspati Do. do. V. 5.
Dascha. I. Dig. B. II. Ch. IV. S. I. V. 9.

of his co-sharers.(a) In *Guru Das Dhar* v. *Bijaya Gobinda Baral.* 1. Beng. L. R. c. a. p. 108, where A, had built rooms on the joint-property, it was argued that all the plaintiff could ask was division, and not the removal of the buildings. But the High Court ordered the buildings to be removed. See also *Janki Singh* v. *Bakhari Singh.* Beng S. D. R. for 1856. p. 761. *Indra Narrain Singh* v. *Tulri Narayan Singh.* Ib. for 1857. p. 765. If he does pledge his own share, it is subject to the claims which the other members may have upon it in respect of family disbursements. *Widow of Macundoss Vahibdoss* v. *Ganpatro Gopenath and others.* Per. O. C. p. 143. In *Mt. Bona Koeri* v. *Baboo Boolee Singh.* 8. Suth. c. r. p. 182. the Court (*Kemp.* J. and *Glover.* J.) laid down as law, that a member of an undivided family, according to the *Mitacshara*, could not alienate joint-family property *so as even to bind his own share.*(b) This, it is apprehended, is not sound law. *See tamen, acc*: *Sheo Surrun Misser* v. *Sheo Sohai.* 4. Beng. S. D. R. p. 158, a case in *Orissa.* The court appears to have proceeded on a consideration of the decision of *Appoviar alias Seetaramiar.* v. *Rama Subba Aiyan and others* XI. Moore's P. C. p. 75. It is conceived that the ruling in that case does not prevent a member of a joint family from effectually dealing with his own share.(c) It will have to be considered under the title *Division.*' The consent of all is necessary, though the property stands in the name of one.(d) 2. Macn. p. 296. In *Sudanunda Surma* v. *Ramchunder Dutt.* 2. Macn. p. 291, it is laid down that in *Bengal* a co-sharer may sell his own interest.(e) See notes 1. Macn. p. 292 and p. 306. *Byjnak Bunboojia* v. *Sumboochund Bunboojia.* Ib. p. 313. See *Ramasamy* v. *Sasachella.* 2. Strange. N. of C. p. 74 *Ramkunhaee Rai* v. *Bung Chund Bunhoojia* 3 Beng. Sell. D. p. 17. *East Doe Dem Gunganarain Bannerjee* v. *Bulram Bonnerjee* Sir H. East's notes of Cases, No. 85, 2. Morley. p. 152, note by Sir *F. MacNaghten.* But in *Orissa*, it is said, such a sale would be void. 2. Macn. 306. So in *Tirhoot*, where such a sale would be bad, even for the seller's own share. *Rajah Bydyanund* v. *Jydutt Jah.* 4. Beng. S. D. R. p. 160. note.(f) Such a sale in *Mitthila* is bad. *Muhoon Misr.* v. *Kunyah Ojah* 1. N. W. Pr. R. p. 275. Where the consent is necessary, the consent of the majority is of no avail to bind the non-consenting parties. *Karteik Surdar* v. *Neerunjun Juleea* 4. Suth. c. r. p. 104, nor is the act of one conclusive against the rest.(a) See *Sasachella Pillay* v. *Venkatachella Pillay.* 2. Str. N. of C. p. 74. 159. *Arnachellum* v. *Venkoo.* Ib. p. 150. *Ellevembadoo Mootiah* v. *E. Nineapah Moodelly.* Ib. p. 163.

(a) Nareda. I. Dig. B. II. Ch. IV, S. I. V. 4.
Vrihaspati. Do do V. 5.
Dacsha. Do do V. 9.

(b) Nareda. 1. Dig. B. II. Ch. IV. S. I. V. 4.
Virhaspati. Do do V. 5.

(c) Nareda. Do do V. 6.

(d) Vyavahara Mayuka. Ch. IV. S. I. 5.
Mit. Ch. I. S. I. 27.
Vide also 212. (c)

(e) Nareda. I. Dig. B. II. Ch. IV. S. I. V. 6.
Dayacrama Sangraha. Ch. XII. S. I. 9.

(f) Vyavahara Mayuka. Ch. IX. 2.
Mit. Ch. I. S I. 27.
Nareda. I. Dig. B II. Ch. IV. S. I. V 4.
Vrihaspati. Do do V. 5.
Dacsha. Do do V. 9.

The power of the father, differs according as the family is under the *Dayabhaga* or *Mitacshara* law.

This must always be borne in mind, in dealing with Bengal and Madras cases, which otherwise will seem to be in a state of hope less conflict. According to the *Mitacshara*, sons, have an "incohate" right in their father's ancestral property, from the moment of their birth;(a) see *Chetty Colum Prussunna* v. *Chetty Colum Moodoo* case 7 of 1823. 1. Mad. Sel. D. p. 406 *Biserur Pershaud Singh Pandy* v. *Baboo Sunteman Persaud*. 4. Wym. c. r. p. 28. *Baboo Beer Kishore Suhye Singh* v. *Baboo Hur Bullub Narrain Singh*. 7. Suth. c. r. p. 502.) and hence the restrictions on the father's power of alienation without their consent in Madras and Bombay, where the *Mitacshara* and *Vyavahara Mayuka* obtain. The same law obtains in *Mitthila*. *Kantoo Lall* v. *Greedhare Lall*. 9. Suth. c. r. p. 469. *Pratabnarayan Doss* v. *The Court of Wards*. 3. Beng. L. R. a. j. c. p. 21. According to the *Dayabhaga*, sons have not an ownership in their father's property, ancestral, or other, until after his decease.(b) Str. Man. § 356. *Kumla Kaunt Chuckerbutty* v. *Gooroogovind Chowdry*. 4. Beng. S. D. R. p. 322. *Kali Doss Neogee* v. *Chundernath Rai Chowdry*. 7. Beng. S. D. R. p. 128.

The consent of sons to a sale by the father is necessary in *Behar* where the *Mitacshara* prevails, except in cases of necessity.(c) *Motee Lal and another* v. *Mitterjeet Singh and others*. 6. Beng. Sel. D. p. 71. *Gopal Chund Pande* v. *Babu Kunwur Singh* 5. Beng S. D. R. p. 24, except perhaps as to a small portion. *ib*. The same is the law in *Tirhoot*, which is under the *Mitthila* school. *Sham Singh* v. *Mt. Umraottee*. 2 Beng. Sel. D. p. 74. *Sheopershad Jah* v. *Gunga Ram Jah*. 1. Wym. 289. s. c. 5. Suth. c. r. p. 221. *Mt. Bhoran Coer* v. *Sahebzadi* 2. Wym. c. r. p. 164.

Sheo Suhaye Sahoo v. *Sreekishen Sahee*. 7. Beng. S. R. p. 105. *Sheo Churn Lall* v. *Jummun Lall* 6. Beng. S. D. R. p. 176. This is the Law in *Midnapore*. *Sheo Surrun Misser* v. *Sheo Sohai*. 4. Beng. S. D. R. p. 158. In *Mithila* the same. *Sheopersaud Jah* v. *Gunga Ram Jah*. 1. Wym. c. r. p. 289. Sree *Jivan Lall Sing* v. *Ram Govind Singh*. 5. Beng. S. D. R. p. 163. *Rama Pillay* v. *Srirangam Pillay*. Mad. S. R. for 1860 p. 49. *Kataparoomal Pillay* v. *Senkara Pillay*. Mad. S. R. for 1855 p. 51. and see 2. Macn. p. 294. He can only alienate or charge his own share.(d) Each holder of a *Shotrium* conferred for lives can only alienate his own life-interest. *Sundramurti Moodelly* v. *Vallinayakki Ummall*. 1. Mad. H. Ct. R. p. 465. In *Goondo Mahadeo* v. *Rambhut Bin Baboobhut*. 1. Bomb. H. Ct. R. p. 39 a member's mortgage of joint-family property was held only good for his own share.(e) *Chinnapiell* v. *Chocken Shewagaren* Mad. H. Ct. R. for 1853 p. 220.

(a) Vyvahara Mayuka. Ch. IV. S. I. 3.
Mit. Ch. I. S. I. 27.
Smriti Chandrika. Ch. I. 27.
Madhavya. 3 and 6.

(b) Dayabhaga. Ch. I, 15 to 19.

(c) Mit. I. S. I. 26 to 29 S. V. 10.

(d and e) Nareda. I. Dig. B. II. Ch. IV. S. I. V. 6.
Jagannada. I. Dig. 403.
Menu. I. Dig. B. II. Ch. II. S. I. V. 5.
Vyasa. Do do V. 6.

See *Ramasawmy* v. *Sasachella.* 2. Str. N. of C. p. 74 and Colebrook's note p. 79. So in Bengal; *Kounla Khant Ghosal v. Ram Huree Nund Gramee.* 4. Beng. S. R. p. 196. So of his sale.(a) *Damadhur Bithul Kharee* v. *D. Huri Somama,* ib. p. 182.

In *Hurodoot Narrain Singh* v. *Beer Narrain Singh.* 11. Suth. c. r. p. 480. Sir *B. Peacock* held that according to the *Mitacshara* a father has no power to settle ancestral property by the conveyance in his life-time, or by will to take effect after his death, without the consent of all his sons living at the time.(b) And see *Pratap Narrain Doss* v. *The Court of Wards.* Ib. p. 343. s. c. 3. Beng. L. c. a. j. p. 21.

He cannot alienate the whole estate to one son, to the detriment of the others.(c) *Ram Lal Teranee* v. *Chuttur Teranee.* 2. Str. p. 7.

In fact, it is only in Bengal that sons are, properly speaking, *heirs*: *nemo est hæres viventis*: their title only accrues on the death of the father.(d) Hence, therefore, the power of alienation which a father has in Bengal.(e) *Kumla Kaunt Chuckerbutty* v. *Gooroogovind Chowdry.* 4. Beng. Sel. D. p. 322. See *Eshanchund Rai* v. *Eshorchund Rai* 1 Beng. S. D. R. p. 2. *Rajah of Nobkissen's* case. F. Macn. 356. *Ramtoonoo Mullick* v. *Ramgopaul Mullick* ib. 340. (in appeal) 1. Knapp. p. 245. *Ramkoomar Neaee Bachesputtee* v. *Kishenkunker Turk Bhoosun.* 2. Beng. S. D. R. p. 42. *Doe dem Jaggomohun Roy* v. *Neemoo Dossee.* Mor. 90. *Huree Lal Chowdry* v. *Kripa Moyee Debia.* 3. Suth. c. r. p. 227.

In Madras and Bombay, no one member can sell the joint-family property for his own use and benefit: nor indeed at all, unless driven thereto by pressing necessity: or without the consent of the other member.(f) An alienation by a father, with consent of his sons, cannot be questioned by a grandson, under *Mitacshara Law.* (g) *Buraik Chuttur Singh* v. *Greedharee Singh.* 9. Suth. c. r. p. 337. where an alienation had been improperly made by a father, without any necessity: *Ramakuti Aiyar* v. *Kullatturayan.* Mad. S. R. for 1859 p. 270. The Court said, "The Court have taken the views of the pundits on the above question. Their opinions have been given separately and are not exactly in accord. The Court gather from them that no such sale can be made, but under emergent or particular circumstances. That is, either that the co-parcener individually making sale of a portion of the family property shall have been driven to the act by pressing necessity, such as having to provide for the support of his family; or shall have reserved what will suffice for the shares of his sons and the maintenance of his wife and daughters. It appears also from the opinion of the senior pundit that he will be unable to give the purchaser a title to a specific portion of the family estate, but

(a) Vide (*a* & *b*).

(b) Mit. Ch. I. S. I. 27.

(c) Mit. Ch. I. S. VI. 5, 7, and 10.
Smriti Chandrica. Ch. VIII. 17, 18 and 20.
Madhavya. 12.

Mit. Ch. I S.I. 27.

(d) Dayabhaga. Ch. I 1, 12, 25, 26 and 31.

(e) Mit. Ch. I. S. I. 27.

(*f* & *g*) Mit. Ch. I. S. I. 27 to 29.
Vyavahara Mayuka. Ch. IV. S. I. 5.

can only reserve to him a right upon what may eventually fall, on division being made, to his own share.

"None of the circumstances above particularized as necessary to warrant of complete a sale of a portion of the family property by the co-parceners the first and second defendants, seem to have had existence in the present instance; nor would it be equitable, or, the Court conceive, legal, even were the sale warrantable, to decree that it should take effect as to the particular portion of land sued for."

See *Khanakasabhaiya Pillay* v. *Sashachala Sastri*. Mad. S. A. for 1860 p. 17, where it was held that a sale was good for the seller's own share. *Sundara Pillay* v. *Tegaraja Pillay* (a) ib. p. 67. See *Ramakuty Ayar* v. *Kullatturayan*. Mad S. R. for 1859 p. 270, in which last case it was held that an undivided share could not be taken in execution of a Decree against an undivided member. But this is not the law at any rate in the Presidency of Madras. See these cases commented on in *Virasawmany Graminy* v. *Ayasawmy Graminy*. 1. Mad. H. Ct. R. p 471. There *Scotland* C. J. said,

"This was a suit for the recovery of two houses and premises numbered respectively 82 and 83, in the Chùlé Bazaar road, which the plaintiff had purchased at a sale by the Sheriff of Madras under a writ of fieri facias issued to recover the amount of damages and costs in an action of trespass against the defendant Ayyasvàmi Grámini and others. Three issues were settled. The first was whether at the time of the sale the houses and premises were the sole and exclusive property of the defendant Ayyasvàmi Gràmini, and the third, whether at the time of the sale there was any valid and subsisting mortgage of the house No. 82. The Court disposed of these issues at the close of the case, finding the first in the negative and the third in the affirmative, and both against the plaintiff. But the second issue raised a further question whether, assuming the houses and premises to be the property of the undivided family of which Ayyasvàmi and the defendants Ayyasvàmi Grámini and Devánè Ammál are members, the plaintiff by virtue of such sale acquired any and what title and interest in the same; and upon this question we have now to give judgment.

"For the defendants it was contended as a matter of law that the sale by the Sheriff passed no interest whatever in the family property; for that even if it had been an alienation by Ayyasvàmi himself without the consent of his co-parceners, such alienation would have been void and inoperative even to the extent of his own share; and this being a sale upon an execution in an action of damages for a tort was put as an *á fortiori* case. But we are of opinion that Ayyasvàmi might have made a valid alienation of his share and interest in the property, and that it passed under the sale in execution by the Sheriff. As regards the supposed distinction where, as in the present case,

(a) Nareda. I. Dig. B. II. Ch. IV. S. I. V. 6. Dayacrama Sangraha. Ch. I, S. XII. 9.

the execution is for damages for a tort, we think that the damages and costs recovered constitute a judgment-debt, and the right of the execution-creditor thereunder, is the same as upon any other judgment for the payment of money. To hold differently in this case would be in effect to declare the pecuniary immunity of all members of undivided Hindu families not possessing self-acquired property for any wrong, however great, which they may commit.

"Mr Mayne, however, mainly relied upon the general ground that no alienation by a member of an undivided Hindu family without the consent of his coparceners can bind even his own share; and he asked our consideration of several decisions of the late Sudr Court upon this subject. It was not disputed that the course of decision in the late Supreme Court since at least the case of *Ramasawmy* v. *Sashathella*, and the opinion expressed by Mr. Colebrooke in his observations upon that case supported the validity of such an alienation to the extent of the alienor's own share: nor that the same rule of law prevails in Bengal. But it was said that there is a foundation for the rule in Bengal which does not exist according to the Hindu law applicable to Madras, for that in Bengal the share of each parcener is treated as separate even before partition, though unascertained.

"In support of this the 31st section of the second chapter of the *Dàya Bhàga* was referred to. But that section appears to be a quotation from Nàreda, and according to Mr. Colebrooke's note to the passage it is otherwise interpreted by different compilers, and is generally understood as declaring the separate and independent right of co-heirs who have made a partition; and certainly the language of the passage itself refers to a condition of separation to some extent. But we do find in chap. 11, sec. 1. § 26, on the widow's right of succession, that the author, in the course of a discussion upon the contradictory statements of text-writers and commentators, makes the observation that "it is not true that, in the instance of reunion [and of a subsisting co-parcenery] what belongs to one appertains also to the other parcener. But the property is referred severally to unascertained portions of the aggregate. Both parceners have not a proprietary right to the whole." This observation, however, is used only in reply to the argument, that the preferable right of the surviving parcener may be deduced by inference from the fact that "the same goods, which appertain to one brother, belong to another likewise," and that, "when the right of one ceases by his demise, those goods belong exclusively to the survivor, since his ownership is not divested." But according to both schools of Hindu law the right of survivorship is not absolute, and the undivided share according to both, descends to his sons; and it seems to us that the real ground upon which the widow's right of succession is placed in the *Dàya Bhàga* is the authority of Vrihaspati, who says that "a wife is declared by the wise to be half the body of her

husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased half the body survives." Adding by way of question, "How then should another take his property while half his person is alive?" So that the right in truth rests upon the oneness of husband and wife, and not upon the existence of a separate estate and interest of the husband in the property during his life. Such a separate estate as a matter of inference might be deduced as well from the descent of the father's undivided share to sons, which is common to both schools of law, as from its descent to his widow, which is peculiar to the Bengal school. It is further to be observed that whatever distinction there exists in this respect was certainly present to the minds of Mr. Colebrooke and of the Judges who decided the cases above referred to.

"It only remains for us to notice the Sudr Court decisions to which our attention was called. We have looked at these cases, seven in number, and we find that three of them expressly decide that one of several co-parceners may bind his own share by alienation and that it is liable for his individual debt. These are the decisions to be found at p. 222 of the reports for 1853, *Chinnapial* v. *Chocken Shevagaren* at p. 220 of reports of 1853 *Valayooda Pillay* v. *Chedumbara Pillay* and at p. 247 of the reports for 1860, *Subarayadu* v. *Gopavajjula Ramana* which is the latest case. There are, however, in the volume for 1860, two decisions in which the contrary is held. One of these, at page 67, *Sundara Pillay* v. *Tegaraja Pillay* is rested upon the authority of the other at p. 17, *Kanakasubhaiya Pillai* v. *Sasachella Shastre* and that again is rested upon the authority of the *Ramaketti Aiyar* v. *Kullatturayan* decision at p. 270 of the reports of 1859. Looking at that case it does not seem to go the length supposed in the two last mentioned cases: for the judgment in terms recognises the power of the co-parcener to confer upon the purchaser a right to what might eventually fall to his share at division, and the suit being for the recovery of a specific portion of property upon an alleged division, which was disbelieved, appears to have been properly dismissed. As to the decision at p. 215 of the reports for 1854, we need only say that the Court appears to have proceeded upon the ground that the managing member having the control of the family property in his own hands could not proceed by suit and process to enforce his individual claim against the property.

"We see nothing in these decisions that materially conflicts with (and some of them support) the opinion we have above expressed, and Sir Thos. Strange in the first volume of his work of authority, at p. 202, expressly says "that in favour of a *bonâ fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt, and for this purpose a court would be warranted in enforcing a partition." What the purchaser or execution creditor of the co-parcener is entitled to is the share to which if a partition

took place the co-parcener himself would be individually entitled, the amount of such share of course depending upon the state of the family. In this case there appear to be two brothers and a step-mother, and the share of each brother is a moiety. There is no evidence of Ayyasvàmi's having sons. If he had, they would no doubt be entitled to shares in their father's moiety, and so the property available for the plaintiff would to the extent of their shares be reduced; and except in this way the existence of sons would not, we think, affect the plaintiff's right."

Sadabart Prasad Sahu v. *Foolbask Koer*, 3 Beng. L. R. p. 31. is in direct conflict with the Madras Case. It was, as above stated, decided by the full Bench. The decision is given in full.

"The second question raises the point whether a member of a joint Hindu family, governed by the Mitacshara law, can mortgage his undivided share in a portion of the joint-family property, in order to raise money on his own account, and not for the benefit of the family. There are conflicting decisions upon the subject, as pointed out by the Division Bench, by which the question was referred. The cases referred to from Dunbar's Bombay Reports, and that from the reports of the High Court at Madras, are in support of the affirmative. The case of *Cosserat* v. *Sudaburt Pershad Sahoo* is an authority in support of the negative. This case has been very ably argued by the pleaders on both sides; and in addition to the Mitacshara on Inheritance, translated by Mr. Colebrooke, numerous passages have been cited from the Sanskrit of other parts of the *Dharma-Sastra* of Yajnawalkya. together with several cases in addition to those referred to by the Division Bench. Amongst others, the pleaders, in support to the affirmative, have referred to the case of *Virasvami Gramini* v. *Ayyasvami Grąmini*. In that case it was held that, according to the Hindu law, as it prevails in Southern India, one member of a joint Hindu family may sell his undivided share of joint property, and that such share is liable to be seized and sold in execution for the separate debts of the sharer.

"The decisions founded on the doctrine of the Schools of Southern India and of Bombay, though entitled to great weight, are not sufficient to justify this Court in a case governed by the Mitacshara law in over-ruling a long series of decisions expressly founded upon that law.(a)

"In *Appoovier* v. *Rama Subha Aiyan and others*, it was held that an actual partition by metes and bounds was not necessary to render a division of undivided property complete; but that when the members of an undivided family agree among themselves with regard to a particular property, that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property is taken away from the subject-matter so agreed to be dealt with; and each member thenceforth has in the estate a definite and certain share

(a) Vide (z) 245.

which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided.

"In that case, however, their Lordships stated that they would be unwilling to reverse any rule of property which had been long and consistently acted upon in the Courts of the Presidency; and we must, I think, be guided by the same principle. Now the case referred to in support of the negative of the question, namely, *Cosserat* v. *Rudaburt Jershad Sahoo*, was not the first case in which it was held that, according to the Mitacshara law, one member of a joint-family cannot alienate his own share of joint-family property, without the consent of all the other members. That decision was founded upon a current of authorities supported by the Vyavashtas of Pundits, which it is too late now for the Courts to over-rule, even if it were disinclined to agree in the principle, established by them.

"In *Nundram* v. *Kashee Pandee*, the question was put to the Hindu Law Officers of the Court whether it was lawful, according to the law current in Tirhoot, for any one of several Coparceners, to transfer his share either by sale or gift; to which the Pundits replied that a gift of joint undivided property, whether real or personal, was not valid even to the extent of the donor's share, and that property could not be sold or given away, until it was defined, and ascertained which cannot be done without a division and they referred to the Mitacshara, by which it was said that "partition is the act of ascertaining several individual rights." The Court, acting upon that opinion, affirmed the decision of the lower Court.

"Afterwards a review having been applied for upon suspicion that the Pundit who had delivered the Vyavashta had been bribed, a fresh Vyavashta was called for from other Pundits of the Court, who answered that property being held in joint tenancy by several sharers, whether it be real or personal, no one of the said sharers has authority, without the permission of the co-sharers, to call any part of the said property his share and to give it away; and they cited as authorities" first Vyasa in Mitacshara:—'In 'immoveable property, whether 'divided or undivided all the sha-'rers share alike; among, then 'one person cannot sell, mortgage, 'or give it away;'"(a) secondly, Nareda in the Daitaka Mimansa:—"Property 'held in common among many sons cannot, under any circumstances, be alienated.' Upon considering the above Vyavastha, the Court ultimately upheld, upon review, the former decision.

"The Vyavashta given in the original case is quoted as an authority in MacNaghten's Hindu Law, page 224, Case XVII.

"The principle of the above case was adopted in the case of *Sheo Surn Misser* v. *Sheo Sahoy* decided in 1826, upwards of 40 years ago. In that case the Judges of the Sudder Dewanny recorded their opinion as follows:—

'The Hindu law, as laid down

(a) Mit. Ch. I. S. I. 27, 30.

'in Vyavashtas delivered in former cases" (referring to the cases above cited), "does not 'permit alienation of lands held 'jointly by several putnidars or 'owners to be made by one, 'without the assent of the others; 'nor indeed does such alienation 'hold good even for the alienating partner's individual share, 'without the assent of the rest."

In a note to the last case it is said:—'The same doctrine was 'also maintained in a Tirhoot 'case, wherein Rajah Bedeanand 'was appellant, against Jay Dutt 'Jha and others, respondents. 'The Pundits there also held 'the sale of joint undivided property to be invalid, without the 'consent of all the sharers, and 'not valid even for the seller's 'own share while undivided."

"A Vyavashta similar in effect, and a decision founded upon a similar principle, were given in 1832 in the case of *Jivan Lall Sing* v. *Ram Gobind Sing*.

"The above principle was again acted upon in *Sheo Shurn Lall* v. *Jumun Lall*, and in *Mussamut Roopna* v. *Roy Reotee Rumun*.

"A similar rule was followed and acted upon in the late Sudder Court of the North-Western Provinces, in the case of *Joynarain Sing and others* v. *Roshun Sing and others*; and in the case of *Byjnath Sing* v. *Ramessur Dyal and others*, decided in 1864, the same Court held that, in Provinces where the succession among Hindus is governed by the Benares Shastras, alienation of joint property, even to the extent of the alienor's own share, is invalid; but that if the property be partitioned, the transfer is legal.

"In the *Vivada Chintamani*, by Prasanna Kumar Tagore, page 77, it is laid down that 'what belongs to many may be given with their assent." "Joint ancestral immoveable property may be given with the assent of all the heirs." "The assent of all the heirs is required for a gift of joint ancestral property, whether moveable or immoveable"—Page 78. "When the whole property is actually divided, the individual action of the shareholders is valid"—Page 79.

"In the Mitacshara on Inheritance, it is said, Chapter I, Section I, verse 30:—'Among unseparated kinsmen, the consent of all, is indspensably requisite, because no one is fully empowered to make an alienation, since the estate is in common.'

"I was at one time disposed to think that as one of several members of a joint family can compel partition of ancestral property against the will of others (*See* Mitacshara, Chapter I, Section 5, Verse 8), so he might, without the will of the others, alienate that share to which he would be entitled upon partition; but upon reflection I feel that that opinion cannot be maintained according to the true principle of the Mitacshara law. In the case of *Appoovier* v. *Rama Subha Aiyan*, to which I have already referred, and which was a case governed by the Mitacshara, the Lords of the Judicial Committee say:—'According to the true 'notion of an undivided family in 'Hindu law, no individual member 'of that family, whilst it remains 'undivided, can predicate of the 'joint and undivided property 'that he, that particular member, 'has a certain definite share. No

'individual of an undivided family 'could go to the place of receipt 'of rent, and claim to take from 'the Collector or Bailiff of the 'rents a certain definite share. 'The proceeds of undivided pro-'perty must be brought, according 'to the theory of an undivided 'family, to the common chest or 'purse, and then dealt with 'according to the modes of em-'ployment of the members of an 'undivided family. But when the 'members of an undivided family 'agree among themselves with 'regard to particular property 'that it shall thenceforth be the 'subject of ownership in certain 'defined shares, then the character 'of undivided property and joint 'enjoyments taken away from 'the subject-matter so agreed to 'be dealt with, and in the estate 'each member has henceforth a 'definite and certain share which 'he may claim a right to receive 'and to enjoy in severalty, al-'though the property itself has 'not been actually severed and 'divided.'(a)

"According to the law of England, if there be two joint tenants, a severance is effected by one of them conveying his share to a stranger, as well as by partition, but joint tenants under the English law are in a very different position from members of a joint Hindu family under the Mitacshara law; for instance, if a Hindu family consist of a father and three sons, any one of the sons has a right to compel a partition of the joint ancestral property; but upon partition during the life of the father, his wives are entitled to shares; and if partition is made after the death of the father his widows are entitled to shares, and daughters are entitled to participate; see Mitacshara, Chapter VII. If partition be made during the life of the father, and another brother is afterwards born, that brother alone will be entitled to succeed to the share allotted to the father upon partition, — Mitacshara, Chapter I, Section 6; but so long as the family remains joint, and separation has not been effected, either by partition or by agreement, such as that recognised in the case above cited from the Privy Council, every son who is born becomes, upon his birth, entitled to an interest in the undivided ancestral property. In such a case, neither the father, nor any of the sons can at any particular moment, say what share he will be entitled to when partition takes place. The shares to which the members of a joint-family would be entitled on partition are constantly varying by births, deaths, marriages, &c., and the principle of the Mitacshara law seems to be that no sharer, before partition, can without the assent of all the co-sharers, determine the joint character of the property by conveying away his share. If he could do so, he would have the power by his own will, without resorting to partition the only means known to the law for the purpose, to exclude from participation in the portion conveyed away those who, by subsequent birth, would become members of the joint-family, and entitled to shares upon partition. They 'who are born,

(a) Mit. Ch. I. S. I. 3.

'and they who are yet unbegotten, 'and they who are still in the 'womb, require the means of 'support, no gift or sale should 'therefore be made."—Mitac-'shara, Chapter I, Section I, Verse 27.

"The Court has very carefully referred to the passages quoted from the Sanskrit of the Dharma Shastra of Yajnawalkya; and in addition to the translation which was handed in, they have had a translation made by Baboo Shama Charan Sirkar, the chief sworn interpreter of the Court, as suggested at the time of the argument. The Court sees nothing in those extracts at variance with the opinions above expressed.

"We are called upon to decide this case according to the Mitacshara law as we find it, and not according to our own views of policy. Whatever our opinions might be, in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by over-ruling that current of authorities by which for nearly half a century, the law appears to have been settled, and in accordance with the principles of which it appears to have been generally understood and acted upon.

"I am of opinion that upon the simple fact stated in the second question, Bhegwan Lal had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint-family property, in order to raise money on his own account, and not for the benefit of the family."

See this followed in *Nathu Lall Chowdry* v. *Chadi Sahi.* 4. Beng. L. R. a. c. p. 15. and *Rajeram Tewari* v. *Luchman Persaud.* 4. Beng. L. R. c. a. j. p. 118. The same law has been laid down in *Bombay*, in *Gangubaikum Sidhappa* v. *Rammana bin Bhimanna.* 3. Bomb. H. Ct. R. c. a. j. p. 66. *Sed quære.*

The Madras case, *Virasawmy Graminy* v. *Ayasawmy Graminy* was not quoted; and the note appended to the Bombay case. p. 68., refers to the cases over-ruled by the Madras High Court. In *Bisneur Persaud Singh* v. *Baboo Luchman Persaud.* 4. Wym. c. r. p. 28, the Court noticed the Madras case and conflicting decisions; but did not decide between them. In *Sheo Ruttun Koonwar* v. *Gour Beharee Bhukut* 7. Suth. c. r. p. 449, it was held that according to the *Mitacshara* a son cannot alienate without the consent of his father;(a) and see *Baboo. Beer Kishore Suhye Singh* v. *Baboo H. B. Narrain Singh* 7. Suth. c. r. p. 502. See 4. N. W. Pr. Rep. p. 22. (bad law.) But in all these cases, as the father or any of the sons can compel a division, it would seem strange if he cannot effectually alienate or charge his share to the extent of what he could receive on a division.(b) This seems a sound principle; and to afford a satisfactory '*ratio decidendi.*' And the same reasoning seems to afford a satisfactory ground for holding the separate share liable to be sold in execution for the separate debt of a member; for what he can do voluntarily, (divide) may surely be done by the Law

(a) Vide (a).

(b) Vyavahara Mayuka. Ch. IV. S. IV. 4.

in invitum, where justice requires it. This seems to follow as a corollary: and so it was expressly held in *Goor Surren Doss* v. *Ram Surun Bhukut*. 5. Suth. c. r. p. 54.

According to the Madras School a father may alienate *his own* share of undivided estate. There is no difference between him and other co-parceners.(a) In *Palanivelappa Kaundan* v. *Munnaru Naikan*. 2. Mad. H. Ct. R. p. 416. the Court said,

"In argument, treating this case as an action for the recovery of the land, it has been contended that a sale by the father is altogether void, that partition for the purpose of satisfying his contracts cannot as in other cases be directed. The principle upon which, following the suggestion of Sir T. Strange and Mr. Colebrooke, the Courts have of late years satisfied the contract of one individual member out of the share which would come to him on partition, is that as the co-parcener has contracted he ought to fulfil his contract, that he could, if disposed at any time, according to the doctrine of the Madras School, enforce a partition, and that it is only just that, where he has incurred an obligation, he shall not be allowed to escape its effects by the allegation that his own deed was *ultra vires*, but compelled to give to his creditor all the remedies to which he would himself be entitled as against the object matter of his agreement. It is quite clear that on the theory of the Madras School there is no distinction between a father and other co-parceners."

But where the owner has sons who have an incohate right in the property, he cannot compromise their rights. ib.(b)

Though a father cannot alienate his ancestral immoveable property, as against his undivided issue, he is master of the gems, pearls, corals, and other moveables, though received from his father. (c) *S. Nullatumby Chitty* v. R. *Mookoondoo Chitty*. 3. Mad. Jur. p. 175. s. c. 3. Mad. H. Ct. R. p. 455. There *Bittleston, J.* said, "Even if it be assumed that Chinnee left jewels, which descended to Mookoondoo as his heir, it does not follow that the plaintiff has any right to complain of his father having made an unjust and partial distribution of them. On the contray, the author of the Mitacshara commenting on the text "the father is master of the gems, pearls, and corals, &c.," declares that, when the grandfather dies his effects become the common property of the father and sons; but it appears from this text alone that the gems, pearls and other moveables belong exclusively to the father, while the immoveable estate remains common. "Mitac. C. 1 sec. 1. cl. 21." And in clause 24, the opinion is given 'that the father has power under the same text to give away such effects, though acquired by his father.'

The sale by a father of ancestral immoveable property,

(a) Mit. Ch. I. S. I. 27, 28 and 29.
(b) Mit. Ch. I. S. I. 27.
Vyavahara Mayuka. Ch. IV. S. IV. 4.
Vide also. (a & b) 220.

(c) Mit. Ch. I. S. I. 24.
Yajnyawalkya. I. Dig. B. II. Ch. IV. S. I V. 13.

without the concurrence of his sons, is not necessarily void, though it may be avoided; unless the purchaser can show that it was made, during a season of distress, for the sake of the family or for pious purposes.(a) In the absence of evidence to the contrary it must be assumed that the price received by the father became a part of the assets of the joint-family; and therefore, if the son seeks the aid of the Court to set aside the purchase, he must do equity, and offer to repay the purchase-money, unless he can show that no part of such purchase- money, or the produce of it has ever come to his hands. *Muddun Gopaul Thakoor* v. *Ram-Buksh Panday*. 6. Suth. c. r. p. 73. *Sahib Z. M. Singh* v. *Rampersaud. Chowdree* 6. N. W. P. R. 325.

The purchaser must prove the necessity: but he is not bound to see to the application of the purchase money *Jugdel Narain Suhayee* v. *Lalla Ram Prokash*. 2. Suth c. r. p. 293.

In *Modho Dyal Singh* v. *Goibur Singh*. 5. Whym. c. r. p. 317. s. c. 9. Suth. c. r. p. 511, it was held that, under Mitacshara law, if a son can show that there was no necessity for his father's alienation, and that he never acquiesced in it, he would be entitled to recover without refunding the purchase-money, or any part of it. If, however, the purchase-money went to credit of the joint-estate, or was applied to removing an incumbrance binding on the son, he would have to refund, or the purchaser would be in the position of the incumbrancer.

The Court there said, "The Principal Sudder Ameen has decided that the Plaintiff must refund, on the authority of a decision of this Court, dated September 30, 1863, *Muddun Gopaul Thakoor*. v. *Ram Buksh Pande and others*, 6. Suth. c. r. p. 71, (II. Wyman's Reporter, 81,) in which it is laid down that, in the absence of evidence to the contrary, it must be presumed that the price received by a father selling a portion of an ancestral estate, became part of the assets of the joint family; and that if a son seeks the aid of a Court to set aside the purchase, he must do equity, and offer to repay the purchase-money, unless he can show that no part of such purchase-money, or the produce of it, ever came into his hands.

"We have been unable to find any other decision of this Court in which a similar doctrine has been laid down, and we are unable to assent to it.

"A long current of decisions has fixed it as settled law that, by the Mitacshara, a father cannot alienate ancestral property without the consent of a son, unless for certain necessary purposes. In all other cases the son has an absolute veto in the sale, and must succeed in a suit to set it aside.

"In the present case it has been found that there was no necessity, and no acquiescence, and we do not see, therefore, why the purchaser should be entitled in equity to a refund from the son of his purchase-money. The son never knew of the sale, and

(a) Mit. Ch. I. S. II. 28, and 29. S. VI. 10

never agreed to it. The sale may have been of a most imprudent description, and one which no man of sense would have made.

"In the present case neither the son nor the father appears to have derived any benefit, for the land was sold in order to redeem a mortgage which had still three years to run, and on which no advantage is even alleged.

"But even were it not so, it appears to us that as the Mitacshara law gives a son an equal right with the father in the matter of alienation, it must give him that right absolutely, and that a son seeking to set aside imprudent or unnecessary sales made by a father, is not bound to refund to the purchasers. If it were so, he would not succeed on his right as a son, but on his power as a man of substance. A poor man would be virtually deprived of the right which the Mitacshara law undoubtedly gives him.

"Cases of this sort appear to us to be those in which the maxim of *caveat emptor* should be strictly applied. Every purchaser in the Mitthila districts knows perfectly well the nature of a father's rights in ancestral property; and if he chooses to purchase without first securing the consent of the heir, or without assuring himself of the existence of a necessity, he has only himself to blame if the son recovers possession of what has been improperly taken from him. He appears to us to have no claim to equitable consideration." And *Peacock*, C. J., in delivering the decision of the full bench, said, "The question upon which the opinion of the Full Bench is asked is, under the Mitacshara law, is a son, who recovers his ancestral estate from a purchaser from the father upon proof that there was no such necessity as would legalize the sale, and that he never acquiesced in the alienation, bound in equity to refund the purchase-money before receiving possession of the alienated property.

"There can be no doubt that, although the word "recovers" is used in this question, the meaning is whether, under the circumstances stated, a son is entitled to recover, except upon condition of refunding the purchase-money. Assuming that to be the question, I think the answer should be that, in the absence of proof of circumstances which would give the puchaser an equitable right to compel a refund from the son, the latter would be entitled to recover without refunding the purchase-money, or any part of it. We express no opinion as to whether he would be entitled to recover the whole or only his share of the estate.

"Having answered the question propounded, I think we ought to add that, if it is proved to the satisfaction of the Court that the purchase-money was carried to the assets of the joint estate, and that the son had the benefit of his share of it, he could not recover his share of the estate without refunding his share of the purchase-money; so if it should be proved that the sale was effected for the purpose of paying off a valid incumbrance on the estate which was binding upon the son, and the purchase-money was applied in freeing the estate from the incumbrance, the pur-

chaser would be entitled to stand in the place of the incumbrancer, notwithstanding the incumbrance might be such that the incumbrancer could not have compelled the immediate discharge of it, and that the decree for the recovery by the son of the ancestral property, or of his share of it, as the case might be, would be good, but should be subject to such right of the purchaser to stand in the place of the incumbrancer.(a)

"It appears to me, however that the *onus* lies upon the defendant to show that the purchase-money was so applied. I do not concur with the decision which has been referred to from II Wyman's Reporter, page 81, in which it is said that "in the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint-family." If the father was not entitled to raise the money by sale of the estate, and the son is entitled to set aside that sale, the *onus* lies on the person who contends that the son is bound to refund the purchase-money, before he can recover the estate, to show that the son had the benefit of his share of that purchase-money. If it should appear that he consented to take the benefit of the purchase-money with a knowledge of the facts, it would be evidence of his acquiescence in the sale."

And see *Muthoora Koonwaree* v. *Bootun Singh.* 13. Suth. c. r. p. 30. where the Court said, "The family is governed by the Mitacshara, and according to the Mitacshara, Chapter I, Section I, it is laid down that 'the father has independent 'power in the disposal of effects 'other than immoveables, for 'indispensable acts of duty, and 'for purposes prescribed by texts 'of law, as gifts through affection, *support of the family,* relief 'from distress, and so forth: but 'he is subject to the control of 'his sons and the rest in regard 'to the immoveable estate, 'whether acquired by himself or 'inherited from his father or 'other predecessor, since it is 'ordained, Though immoveables 'or bipeds have been acquired 'by a man himself, a gift or sale 'of them should not be made 'without convening all the sons,' 'They who are born and they 'who are yet unbegotten and 'they who are still in the womb 'require the means of support,— 'no gift or sale should, therefore, be made."

"The exception to this is to be found in Clause 28, which is as follows:—"Even a single individual may conclude a donation, 'mortgage, or sale of immoveable 'property during a season of 'distress for the sake of the family, and especially for pious purposes." The meaning of that text, says the Commentator, is this—'*While the sons and* 'grandsons are minors and incapable of giving their consent 'to a gift and the like; or while 'brothers are so, and continue 'unseparated; even one person, 'who his capable, may conclude 'a gift, hypothecation, or sale of 'immoveble property if a calamity affecting a whole family re-

(a) Menu. I. Dig. B. Ch. V. 186. and Vide. (a) 241.

'quire it, or the support of the 'family render it necessary," &c.

"Therefore it is clear that the cases in which a single member of a family governed by the Mitacshara Law is empowered to sell immoveable property for the purpose of paying off family debts are confined to those where the sons and grandsons are minors, or otherwise incapable of giving their consent.

"We should have felt little difficulty in coming to a conclusion that the consent of the sons was given to the sale by the father. But the case as put before us is not rested on that ground. There is no doubt that great benefit must have resulted to the family by the sale to Muthoora and the payment of the mortgage debt hanging so heavily over the estate. Considering that for seven years after the sale, no objection appears to have been taken to it by the present plaintiff, we should have been strongly inclined to presume that he *had* given his consent to the sale. But the issues framed show that it was treated by both parties as a fact that such consent was not given.

"The money arising from the sale having gone to the payment of family debts, according to the case reported at page 512, Volume IX, Weekly Reporter, the plaintiff is not entitled to get the estate relieved from the burden of those debts; and the sale being set aside, he can only get possession of his one-fourth share as it now stands, on payment of his one-fourth share of the 875 rupees paid by Muthoora and applied in payment of such debts."

A father may sell a small portion of the ancestral estate for pious uses, without consent of his sons, according to the *Mitacshara*. (a) *Gopal Chand Pandeee* v. *Babu Kunwar Singh*. 5. Beng. Sel. D. p. 24. What are such uses are thus enumerated by the Pundits in that case: "1st. A present for performing indispensable rites in honour of ancestors. 2d. A present to Priests officiating at sacrifices and the like. 3d. Pious and reverential gifts, to Brahmins,—as *Brahmutra, Krisnhàrpana, Jadâr gha*,—in satisfaction of a vow,—as *Vritti* or aliment,—also gives from affection towards *Vishnu* and other divinities."

In *Bisambhur Naik* v. *Sudasheeb Mohaputtur*. 1. Suth. c. r. p. 96. it was held that under the *Mitacshara* law, according to which the father and son are joint owners in the ancestral estate, the son's power to prevent alienation by the father, extends to acts of waste, and not to alienation for the payment of joint-family debts, and for the maintenance of the family. (b) There the Court said;

"In special appeal, it is contended that as the parties are governed by the Mitacshara, and under that law the father and son are joint owners in the ancestral estate, the alienations of the father without the consent of the son are illegal and void. A decision of the late Sudder Court, dated the 8th June 1861, is quoted in support of this contention.

"The lower Court having found that the alienations by the father were made under legal

(a) Mit. Ch. I. S. I. 26.
(b) Mit. Ch. I. S. VI. 10. Mit. Ch. I. S. I, 27 and 28.

necessity to pay the debts of the joint-family, and for the family, we have only to consider whether the consent of the son was necessary, and in the absence of such consent, whether the sales are void.

"In the case quoted by the pleader, it was ruled that under the law of Mitthila, the father and son are joint owners, and that the father can only exercise the power of alienation in the case of a minor son existing at the time, under circumstances of legal necessity. The Court did not go beyond this and lay down, whether a father could alienate for legal purpose in the case of a major son existing, without the consent of the son.

"We fully admit that, under the Mitacshara law which governs this case, the father and son are joint owners in the ancestral property, but we hold that the son's power of interdiction to prevent alienations by the father of the ancestral estate extends to acts of dissipation or waste of the property only, and not to alienations for the payments of joint-family debts and for the maintenance of the family. *See* Mitacshara, page 179, Section 10. "We fail to see why it should be legal for a father to alienate for legal necessity, where a minor son exists who cannot protect his interests, but illegal where there is a son who has arrived at majority; and can exercise the power of interdiction if the father commits waste, but fails to do so and stands by and allows innocent purchasers to give a good consideration for the properties. In the present case, we find a father making alienations of properties of no great value (the suit is laid at some Rupees 131) to pay debts and to maintain the family. These are indispensable duties and such as no good Hindoo can neglect. The son, eleven years eleven months and twenty-eight days after date of these alienations, brings this suit to question his father's acts, and wholly fails to prove that those acts were acts of waste, or that the debts were contracted for an improper purpose. In fact, the suit is clearly brought to defraud the purchasers, and under the circumstances, we cannot but think that the father and son are colluding together."

In *Kullur Singh* v. *Modhoo Dyal Singh*. 5. Wym. c. r. p. 28. a sale of family property made by a Hindoo father living under Mitacshara law, merely in order to enable him to redeem a mortgage, the term of which was not nearly expired, was held not to be made under such a pressing legal necessity as would prevent his son from suing to set it aside, if made without his (the son's) acquiescence: and that want of acquiescence on the son's part is sufficient to make the sale by the father void in the absence of legal necessity. It is not necessary that the sale by the father should be wasteful; it might even be advantageous.

In this case compared with the case immediately preceding, it is to be observed that the absence of legal necessity draws the line of distinction. (*a*)

In *Nowbut Singh* v. *Durbane*

(*a*) Mit. I. S. 1, 28 and 29.

Singh. 2. N. W. P. H. Ct. R. p. 145, it was said that a father has no definite share in joint ancestral property which he can alienate. *Sed Quære*. In *Jawahir Singh* v. *Guyan Singh* 3. N. W. Pr. H. Ct. R. p. 78, it is laid down, that a son can only controul his father's acts in respect of property, the succession to which is *liable to obstruction*. It is only in respect to property not subject to obstruction (as to which *post-succession*) that the wealth of the father and grand-father becomes the property of his sons by virtue of birth. In *Gunga Deen Rawut* v. *Modhoo Surun*. 4. H. Ct. R. N. W. Pr. p. 4. it is said that a nephew is not competent to object to any alienation of property directly or indirectly made by his uncle. *Sed Quære*. The case is so reported that it is impossible to get at the facts: but it is conceived that the law is far too broadly laid down. Suppose the nephew and uncle to be members of a joint-undivided family, with joint ancestral immoveable property, of which the uncle is the managing member: surely the nephew could validly object to his uncle disposing of more than the share which would fall to him on a division?

The interest which a son has is limited. In I *Rayacharlu* v. *J. V. Venkataramaniah*. 4. Mad. H. Ct. R. p. 60, it was held that, a son during the life of his father has, as co-parcener, a present proprietary interest in the ancestral property to the extent of his proper share; but beyond that, he has vested in him no legal interest whatever whilst his father is alive. Therefore no suit will lie by a son during his father's life to obtain (except by way of division) possession of the ancestral property.(a) *Radhey* v. *Baboo Bhurt persaud* 6. N. W. P. R. p. 414. *Peer Buksh Khan* v. *Ram Doss* 7. N. W. P. R. 311. *Pussam Sahoo* v. *Randeen Lall. ib* 365.

Except in respect of his co-parcenery rights, a son is not in a different position as to the *corpus* of the ancestral property from that of any other relation who is an heir apparent of the owner of property.

Though the Limitation Act may have been decided to be a bar to a suit by the son for partition, his right as co-parcener has not thereby been destroyed; and it may be, that he is entitled to relief against the improper disposal by the defendant of more than his proper share of the property.

In the case *Supra*, 4 Mad. H. Ct. R. p. 60. the Court said, "A son during the life of his father has, as co-parcener, a present proprietary interest in the ancestral property to the extent of his proper share; but beyond that he has vested in him no legal interest whatever whilst his father is alive. The father, to the extent of his own share as co-parcener, is entitled to make valid dispositions, and it is not until his death that any interest arises to the son as heir. See *Virasámi Grâmini* V. *Aiyasami Gramini* (1 M. H. C. Reports 471) and *Palanivelappa Kandan v. Mannaru Naiken and another* (2 M. H. C. Reports 416.) Except in respect of his co-parcenary

(a) Mit, Ch. I. S. VI. 5, 7 and 10.

rights, a son is not, we think, in a different position as to the corpus of the ancestral property from that of any other relation who is an heir apparent of the owner of property. The Lower Courts appear to have considered that the plaintiff had acquired a reversionary right in the property. But that right exists only when the possession and enjoyment of property has passed from the owner only for a limited particular estate or interest as in the instance of the succession of a widow to her husband's property. She takes only a life-estate, and the reversionary right to the property passes to the next heirs of the husband subject to certain conditions. But in no view of the present case does it appear that the plaintiff has such a right.

"As only son he has a present proprietary interest in one undivided moiety of the property, and nothing more. Consequently, the suit for the establishment of an existing *reversionary* right in him as heir to the whole property on the death of the defendant, and the decrees declaring such right, are groundless."(a)

In *Aiyodhia Persaud Singh* v. *Bissessur Ram Bushee.* 2 Wym. c. r. p. 27. the Court (Sir *Barnes Peacock* C. J. and *Bailey*. J.) seemed to think that according to the *Mitacshara,* a father has a power of disposing of his self-acquired property, larger than that over his ancestral. But the point was not decided. In *Tandavaroya Gounden* v. *T. Gounden.* Mad. S. R. for 1859. p. 40. it was held that the common ancestor with male issue could not alienate any of the ancestral property.(b) See also *Mookaoond Misr.* v. *Kusyabroojah* I. N. W. Pr. R. p. 275. In *Muthuam* v. *Lukshim.* Mad. S. R. for 1860. p. 277 it was held that a father was not competent to alienate either ancestral, or self-acquired immoveable property, to the prejudice of his sons: nor for urgent necessity.(c) In *Soobbaputten* v. *Jungamiah Acharry.* Mad. S. R. for 1851. p. 3. where a man had charged his property, and *afterwards,* had sons, it was held to avoid his deed; because a father cannot alienate so long as he is able to beget children. *Sed quære*; for it is difficult to see how there can exist any 'incohate' right, before the son is born, or at the farthest, as some authorities put it, conceived. *Baboo Kantoo Lall* v. *Baboo Greedharee Lall.* 5. Wym. c. r. p. 266. *Yekeyamian* v. *Agniswarain.* 4. Mad. H. Ct. p. 307. in which case it was held that according to Hindu Law, sons acquire rights only in the property which belonged to their father at the time of their birth, and have no legal claim to property of which a *bonâ fide* disposition, effectual as against their father, had been made long before they were born: and that the right of an after-born son to share as a co-parcener in divided property depends upon his mother being pregnant with him at the time of a partition.(a)

In *Buraik Chuttur Singh* v. *Greedharee Singh* 9. Suth. c. r.

(a) Vide. (c) 224.
(b) Mit. Ch. I. S. I. 27.
Smriti Chandrika. Ch. VIII. 20.
Vyavahara Mayuka. Ch. IV. S. IV. 4, & 13

(c) Mit. Ch. I. S. I. 27.
Madhavya. 6.
(a) Mit. Ch. I. S. VI. 5, 6, 8 & 9.
Smriti Chandrika. Ch. VIII. 1 to 7.
Madhavya. 13.

p. 337 it was held that where a father sells with the consent of the sons, under the *Mitacshara*, the grandsons cannot question the sale; nor can a son, born, or conceived, at the date of alienation question it *ib* 5. N. W. Pr. R. p. 432.(a)

The 'incohate' right of a son under the Mitacshara, whence flows his right to set aside alienations made by his father against his will receives further illustration from *Baboo Goursurn Dass* v. *Ramsurn Bhughut* 1. Wym. c. r. p. 106. *Gungoo Mull* v. *Bunseedhur* 1. Allahabad Reports p. 71. *Sudanund Mohaputtur* v. *Soogoomonee Dossee*. 11. Suth. c. r. p. 436. *B. Latchemucha* v. *Visvanada* 2. Str. p. 212 : and also incidentally in two Calcutta Cases on the Statute of Limitations, where it was held, that when a father so alienated, the son's cause of action rose, not from the date of his father's death, but from the date of the alienee's taking possession. In *Baboo Beer KishoreSuhey Singh* v. *Baboo Hur Ballub Narrain Singh*. 7. Suth. c. r. p. 502 the Court said,

"We are of opinion that the Judge is clearly wrong in holding that the plaintiff's cause of action accrued from the death of his father Zalim Singh. The date of the alienation, or at all events of the possession under it, must be considered as the starting points from which the Statute commenced to run against the plaintiff. The Plaintiff having an equal right with his father, was competent to sue to set aside the alienation of his father during the life-time of his father; and unless under legal disability owing to minority at the time the sale was made, he ought to have brought his suit within the prescribed period from the date of alienation."

And see acc. *Bissesur Persaud Singh Pandy* v. *Baboo Luchman Persaud*. 4. Wym. c. r. p. 28.

A son is not affected by his father's fraud. *Baboo Beer Kishore Suhyee Singh* v. *Baboo Hur Ballub Narrain Singh*. 7. Suth. c. r. p. 502.

"The plaintiff, it is obvious," the Court said, "had an equal right with his father in the ancestral property; he could compel his father to divide the property during his life-time, and any alienation by the father made after the birth of the son, without the consent of the son, unless for a purpose justified by the Hindoo Law as a legal necessity, would not bind the son. If, therefore, the father, during the minority of the son, alienated the properties in fraud of his creditors, such fraud would not bind the son, who was neither a party nor a privy to such fraud.

"In the case cited by the Judge published in Hay's Reports for December, pages 528-532, the plaintiff claimed through the heir of the party who had committed the fraud, and it was held that he was not at liberty to plead the fraud of the party through whom he claimed against the defendant in possession, for to allow this would be to violate a well-known principle of law which does not permit a party to set up the fraud of the party through whom he claims. The decisions quoted by

(a) Mit. Ch. I. S. I. 27.

the Judge from Volumes III and IV of the Weekly Reporter recognise the same principle. In the present case the son does not claim through his father, his title is from his birth a title wholly independent of and equal to that of the father. The acts of the father even if fraudulent, are clearly not binding upon the son."

In Bengal a father can sell or give in pledge, without the consent of his sons, ancestral immoveable property; and without consent of sons, can by will prevent, alter, or affect, the succession to such property.(a) *Huro Lal Chowdry* v. *Kripa Moyee Deebee*. 3. Suth. c. r. p. 227. In *Eshanchund Rai* v. *Eshorcund Rai*. 1. Beng. Sel. D. p. 2, where a Zemindar gave all his estate to one son, it was held valid. The Court there held, 1st, that, according to law, a present made by a father to his son, through affection, shall not be shared by the brethren: 2nd, that what has been acquired by any of the enumerated lawful means, among which inheritance is one, is a fit subject of gift: 3d, that a co-heir may dispose of his own share of undivided property: 4th, that although a father be forbidden to give away lands, yet, if he nevertheless do so, he merely sins, but the gift holds good: 5th, that *Raghunandana* in the *Dayatatwa*, restricting a father from giving lands to one of his sons, but clothes and ornaments only, is at variance with *Jimuta Vahana* whose doctrine he espouses, and who only says, that a father acts blameably in so doing: 6th, that a principality may lawfully and properly be given to an eldest son. And see note(a) to that case.(b) In *Bhowany Churn Bunhoojia* v. *Heirs of Ram kaunt Bunhoojia*. 2. Beng. Sel. D. p. 202, it was held that a father in Bengal could not make unequal division among his sons. See also note(a) to this case. p. 214. This case is opposed to *Ramkoomar Neaee Bachesputtee* v. *Kishenkunker Turk Bhoo sun*. 2. Beng. S. D. p. 42. where *semble*, the gift by a father even to a stranger would be valid. The case in 2. Beng. Sel D. p. 202, came under review by the Beng. S. D. A. on 2 Sept. 1831; and in *Mortee Lal* v. *Mitterjeet Singh*. 6. Beng. S. D. the Court made the following remarks: "The precedent, therefore, of the case of Bhowanee Churun Bunhojeea, as regards Bengal, must be considered as superseded. The case now reported, those cited in Mr. Robertson's judgment, and that of Shara Sing appellant, (vol. II page 74,) are decisive that the father's power over ancestral property is restricted under the law as received in Behar, and generally where the authority of the Mitacshara is respected. The exceptions to the general rule are propounded in the vowusth of the pundit of the Sudder Dewanny Adawlut taken in the case of Gopal Pandeh, appellant, vol. V. page 28." So complete indeed is this power, that in *Kali Doss Neogee* v. *Chunder Nath Rai Chowdry* 7. Beng. Sel. p. 128, a sale by a father of ancestral property, while in jail under a criminal sentence, was held good against his son.(c)

(a & b) Dayabhaga. Ch. II. 27, 28, 29. Ch. I. 13, 14, 18, 19, 26, & 30.

(c) Mit. Ch. S. I. 28. 29.

Another distinction always to be borne in mind in dealing with cases on the power of alienation by individual members of the joint-family is, that between ancestral and self-acquired property. These two principles are the keys to the cases on this part of the Law.

Self-acquisition :—A father, under the *Mitacshara*, may alienate his *self-acquired* immoveable property; *Muddun Gopaul Thakoor* v. *Ram Buksh Pandy*. 6. Suth. c. r. p. 71. *Oojoodya Pershad Singh* v. *Ram saran* ib. p. 77. Being out-caste does not deprive him of his right of alienation. ib.

A man may alienate his family *self-acquired* property. *Samy Iyen* v. *Iyavien*. Mad. Sud. R. for 1855. p. 146. But in that case it is not clear whether the donor was divided or not. I apprehend there is no doubt, however, that a member of an undivided family may alienate his self-acquired property.(a) The *Shevagunga* case. 9. Moore's I. A. p. 559, (in effect over-ruling *Varadiperumal Udayian* v. *Ardanari Udayian*. 1. c. Mad. H. Ct. R. p. 412 and a long course of Madras decisions) which settled that it goes to his widow in preference to the undivided males of his family, (See 1. W. and Bühl. p. 70) seems to make it absolutely his own to dispose of as he pleases during his life.(b) In Bengal, the self-acquird property always went to the acquirer's widow, failing male issue; not to the undivided family.(c) *Kaleepershaud Roy and others* v. *Digumber Roy*. 2. Beng. Sel. D. p. 237.

Where a father is a self-acquirer, and distributes such property among his sons; it is not in *their* hands self-acquired, so as to enable them to dispose of it against the grandsons. *Muddun Gopoul Thakoor* v. *Ram Baksh Pandey* 6. Suth. c. r. p. 71. In *Maha Sorkh* v. *Budree*. 1. H. Ct. R. N. W. P. (for 1869.) p. 57, it was held that under *Benares* Law, a man cannot dispose of his *self-acquired* immoveable property so absolutely in his life-time, as to enable him to give it all to one grandson or son to the exclusion of the rest.(d) *Sed Quære*. In *Ravoory Krishiniah* v. *Ravoory Panakaloo* Mad. Sp. App. 59 of 1847. S. R. for 1849. p. 107: it was held that brothers have no right to share in it. See(e) Acc: *Tegnarrain Mullich* v. *Bissumboo Mullich*. 1. F. Macn. p. 48. The self-acquirer may will it away as he pleases. *Sreemutty Soorjeemooney Dossee* v. *Deenobundoo Mullich*. 6. Moore's I. A. p. 526. See *Nana Narrain Rao* v. *Hurree Punt Bhao and others*. ib. p. 464. where the father, self-acquirer, has not alienated or devised, his sons share his self-acquisition equally. 1. W. and Bühl. p. 31.(f) The same of father and son's sharing in self-acquisition of grand-father ib p. 32.

It is convenient to consider here somewhat further what constitutes self-acquisition. Acquisition by a joint-family will be presumed to have been joint, till the contrary be proved. *Gour Chunder Rai* v.

(a) Smriti Chandrika. Ch. VIII. 22, 23, 25. and 26.
(b & c) Smriti. Chandrika, Ch. VIII. 22, 23, 25. and 26.
(d) Dayabhaga. Ch XI. S. I. 3, 4, 5, and 55.
(e) Mit. Ch. I. S. I. 27.
(f) Vyavahara Mayuka. Ch. IV. S. VII. 1 & 2. Dayabhaga. Ch. VI. S. I. 3. Mit. Ch. I. S. IV. 2.

Hurish Chunder Rai. 4. Beng. S. D. R. p. 162. The clue to decide whether property is self-acquired is, to ask whether patrimonial property has in any way been instrumental in its acquisition. (*a*) See *supra*, the whole discussion as to the *criterion* of joint property, and the *onus* of proving it. See a strong case, *Ghansham Kumari* v. *Govind Singh.* 5. Beng. Sel. D. p. 202. Sir. *T Strange* Vol. 1 p. 1. 89 lays down the following criteria:

"But the most general ground of impartibility is *separate acquisition.* The common stock (as has been already observed) may consist either of ancestral, or of acquired property, or of both; and, having been augmented or improved, the benefit, on partition, as well as during the period of joint occupancy, accrues to all alike, without regard to the degree in which each may have contributed to its enhancement. It is like *accretion*, under the civil law. The property is substantially the same that it was, though rendered more valuable by cultivation and care(*b*) But a member of an undivided family, continuing such, and enjoying, in common with his coheirs, every advantage incident to their unseparated state, may, in the mean time, acquire separate property to his own particular use; in which, upon a division, they will have no right to share. But the acquisition, in order to be so, must have been an original and independent one; the essensce of the exclusive title consisting in its having been made by the sole agencies of the individual, without employing for the purpose what belongs in common to the family. If the family property have been instrumental to it, it vests in the family. Whether it have been so, to the effect of rendering joint that acquisition which was, in fact, the product of an individual, may be sometimes a question of nicety, suited to the subtle disquisition of Hindu lawyers. Assuming as a Hindu principle, that *de minimis non curat lex*, (it being said, on another occasion, that "things of ordinary value may be given up, "*for they are mere chaff*," in the instances adduced, of a co-parcener, in the practice of separate agriculture, taking a rope for his plough out of the common stock, or of one begging alms, in a pair of shoes that had belonged to it, it might be disputed, whether such contributions could invalidate his pretensions to an exclusive right in property so acquired. "The question, in these cases, must be one of discretion."

Land purchased by a co-parcener with *borrowed* money is his self-acquisition.(*c*)2. Macn. p. 151 152. 154. 155. 156. 161. See also 2. Str. 310. property acquired by any particular member without employment of the family funds is separate property.(*d*) *Calathy Pillay* v. *Ella Pillay.* 1. Mad. Sel. D. p. 148. If a manager, or member, converts the proceeds of

(*a*) Vyavahara Mayuka, Ch. IV. 5. 2.
Dayabhaga. Ch. VI. S. I. 3.
Mit. Ch. I. S. IV. 2.

(*b*) Mit. Ch. I. S. IV. 30 and 31.

(*c*) Mit. Ch. I. S. IV. 7.
Dayabhaga. Ch. VI. S. I. 1 to 5.

(*d*) Menn. IX. 208.
Yajnyawalkya. II. Dig. B. V. Ch. V. V. 352.
Mit. Ch. I. S. IV. 7.
Dayabhaga. Ch. VI. S. I. 1. to 5.

the joint ancestral estates, in purchase of other estates he does so for the benefiit of the family, and the newly acquired estate is joint property.(a) *Mt. Bona Koeree* v. *Baboo Boolee Singh.* 8. Suth. c. r. p. 182. Where two brothers lived together without any paternal estate, purchased lands, and held them together in common for several years, the elder brother contributing the captial, and both giving their labour, they were held co-parceners, and on a division, the elder brother entitled to two-thirds.(b) *Koshul Chukerwutty* v. *Radanath Chuckerwutty* 1. Beng. S. D. R. p. 335. So in *Rampershad Tewarry* v. *Shoechurn Doss and others.* 10. Moore's I. A. p. 490, it was held, that where one of five brothers constituting an undivided family, but having no ancestral estate, acquired personal property with which, *and the aid of his brothers,* he established a Bank, and carried on Banking business at five different places, the property was joint, in which the brothers were entitled to share. As to the right of the larger contributor to a larger share, see *Sreenarrain Beera* v. *Gooroopershad Beera.* 2. Wym. c. r. p. 262.

And see 2. Str. 306. *Ellis's* note p. 307 *Seenawasa Chetty* v. *Colletta Chetty* ib. p. 308 and the notes of *Ellis* and *Sutherland* thereto. Mr. *Ellis* thinks that if the Defendant had been educated by his father, his acquisition, would not have been self-acquisition. But Mr. *Sutherland* queries this very fine distinction. It is very like the case of begging alms in family shoes. But see 1. W. and Bühl. p. 2. where there is an extreme case on the effect of paternal education. There a man got his son married, and spent a considerable sum on his education. The son emigrated; and was for a long time on service in another country, where he acquired considerable property and died. The Pundits held that all he had not given to his wife went to his father.(c) The learned Editor remarks that as the son was instructed at the father's expense, the property gained by him cannot be separate. Possibly a separation might have been reasonably inferred from the circumstances of the case. In the important case of *Chalakonda Alasani* v. *Chalakonda Ratnachalam.* 2. Mad H. Ct. R. p. 56. all the authorities were collected and reviewed. That was a case in which the science was dancing, and the Plaintiff a prostitute. *Holloway J.* said;

"This is an appeal from a decree of the Civil Judge of Vizagapatam, declaring the jewels and other articles the special property of the prostitute daughter and grand-daughter of the plaintiff on the ground that they are part of the gains of science.

"In his very elaborate judgment, the Civil Judge has referred to nearly every authority upon the subject; and we feel the more bound to express our thanks for the ample materials for judgment which he has collected, because although with every deference to his opinion, we feel bound to come to somewhat different conclusions.

(a) Vide 191 (a).
(b) Dayabhaga. Ch. VI. S. I. 23.
Dayacrama Sangraha. Ch. IV. S. I. 5.
(c) Vyavahara Mayuka. Ch. IV. S. VII. 7.

"We are of opinion, with the Civil Judge, that, as this question must be decided by Hindu law, it would not be possible for us to decline adjudicating upon the matter on account of the immoral source from which the gains have been derived. Precedents, not indeed numerous but uniform, have recognised rights of property and of inheritance between the prostitute and her offspring.

"The facts of this case are, that the first defendant was brought up to her profession by the family of the plaintiff—singing and dancing were taught her at the expense, either of the plaintiff's sister, from whom the plaintiff subsequently divided or of the plaintiff herself. The first defendant was brought up as the child of the plaintiff: she speaks of her as her mother: for a long series of years they have lived as mother and daughter, and for the purposes of this cause must be treated as mother and daughter of an undivided family.

"The Mitàcsharà is in this, as in all other questions of Hindù Law arising in these provinces, the first authority to be consulted. The language of the commentator is unusually explicit (sec. 6). "That gained by science without use of the family-estate is not the subject of partition." The objection to the interpretation is repelled by a distinct text of Nàreda. 'He who 'maintains the family of a 'brother studying science, shall 'take, be he ever so ignorant, a 'share of the wealth gained by 'science.' The same conclusion must be derived from the definition of wealth gained through science by Kátyàyana, stated by Colebrooke to be an expositor of the highest authority. That definition is "wealth gained through science which was acquired from a stranger while receiving a foreign maintenance, is termed acquisition through learning." It follows that gains of that science, imparted at the family expense and acquired while receiving a family maintenance, are not impartible property.

"It must be admitted that it is difficult to reconcile çlokas 204 and 205 with çloka 208 of Menu. Clokas 204 and 205 seem to render partible the self-acquisitions of brothers living in union after the death of their father; and according to the ancient law and that of Bengal, there seems nothing unreasonable in the provision. At that time division can be enforced, and if they elect to live together there is nothing inequitable in treating their acquisitions as joint.

"It seems to us that çloka 208 must be read in strict connexion with 207. This provides for a brother with an occupation adequate to his maintenance abandoning all claim to a share. It may well be that with superfluous caution the legislator went on to provide in 208, that the acquisitions of such a brother not being made with family funds, he need not give a share. It can scarcely be supposed that the emphatic expressions "by his own efforts" and "by their own labour" had not reference to what would naturally be self-acquisitions but for the fact of the brothers "electing to live in "union after the father's death." The sense scarcely permits the hypothesis that acquisitions by

family funds were meant. If this is the correct solution, then çloka 206 will have precisely the meaning attached to it by the commentators, and the three together would read: "The self-acquisi- "tions of an elder and also of "younger brothers living in union "after the father's death will be "partible, but the acquisitions of "learning and skill will not be." We do not feel at all confident that this is the correct explanation, and we are doubtful whether a perfectly satisfactory one is possible. The obscure character of these passages would in any circumstances prevent us from over-ruling by their authority the distinct statements of jurists who have expanded and explained the fragments of Menu who is much more ethical and religious than jural.

"Jimúta Váhana sums up the doctrine thus: 'Since it appears 'from these and other texts that 'partition does or does not take 'place in the case of wealth ac- 'quired by science, valour or the 'like according as joint property 'is or is not employed.' The texts quoted justify his conclusion, which differs in no respect from that of the Mitácsharà.

"We do not think it at all necessary to examine at length the discussion of the matter in Colebrooke's Digest. The doctrine of the compiler is in accordance with that of the Dàyabhàga and the Mitàcsharà. We will only say that passages are to be found there which seem to point to a distinction between the gains of ordinary learning or valour and the great rewards occasionally obtained by some extraordinary exhibition of either. It is unnecessary, however, to consider whether there is any solid ground for this distinction. We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science which have been taught at the expense of the family funds, are not impartible. To render them so, the science or learnning must have been imparted by persons not members of the learner's family. Although, in deference to the elaborate judgment of the Civil Judge, we have entered upon this discussion, it is in our opinion very doubtful, whether upon the facts of this case the question arises. The gains can scarcely be said to be those of music and dancing. They are rather the proceeds of an unfortunate trade, recognised and legalized by Hindù law, and carried on for a long series of years by this family. It cannot be doubted upon the evidence that the ornaments and dresses, with which the business of the first defendant commenced, were the property of the old woman; that they do not now appear in the shape in which the plaintiff wore them, by no means shows that some of them, at all events, were not her's. They may well have been altered and adapted to modern taste for the daughter. The evidence which professes to declare them the specific acquisition of either, is wholly worthless. That on their attachment, the dresses and jewels were found in possession of the daughter and grand-daughter, and the cooking-vessels in that of the plaintiff, is only natural. The witnesses for the defendant have spoken to the

receipt by the plaintiff, on partition with her sister, of a considerable sum of money which they allege her to have squandered. It is quite clear, however, that the first defendant was from a child brought up by the plaintiff and her family, and it seems to us that the plain principles of law, no less than common justice, require us to hold this property joint, and the plaintiff, as the eldest member of a joint family, entitled to its possession. No objection, except upon the ground of self-acquistion, has been made, and we are satisfied that that objection, in the circumstances disclosed, is untenable."

In *Dhoonookdaree Lall* v. *Gunput Lall* 10. Suth c. r. p. 122. *Mitter*. J. held that the fact of the Defendant having received his education from the joint-fund, did not entitle the Plaintiff to share in every property acquired by the Defendant by the aid of such education.

Mr. *Grady* p. 405. remarks: "All the authorities in support of this rule of Hindoo law, which is most difficult to apply in practice, were, in this case, (2. Mad. H. Ct. R. 56,) cited both by the civil judge, (who held an opinion adverse to that just expressed by *Mr Justice Holloway*,) and by *Mr. Sloan*, who argued the case for the appellant with great ability. Yet it can hardly be regarded as an authority which decides this intricate and difficult question of Hindoo law, for the judgment of the Appellate Court did not proceed upon that ground, but turned on a very different point—viz., the gains of prostitution. The question of the divisibility of the gains of science and learning acquired by one of its members amongst an undivided Hindoo family has therefore yet to be decided, and the better opinion seems to be, that when it does come before the Courts for judicial decision it will be held that the opinions of old text-writers and commentators will have to give way like other equally complicated and embarrassing rules of the same law; such, for instance as the rule which makes vice an impediment to inheritance before the enlightenment of sounder reason and the requirements of modern society. It will be found that the impossibility of applying the rule with any regard to the principles of law or equity will induce the Courts to hold, that it is a relic of a past and barbarous age, which cannot be acted upon in consequence of its impracticable nature, arising from the dificulty of drawing the line as to what is or is not, imparted at the family expense. Its impracticability lies at the very foundation of the rule, for what source of gain is there that is not traceable, if not attributable to expenditure of family funds? What science or learning, which has been acquired by the members of a family is there that is not primarily, or remotely attributed to the expenditure of ancestral property? A member of a Hindoo family can acquire no gains without the preliminary expense of maintenance. Does maintenance, then, cause the gains of learning or science to be divided amongst the fraternity?" No man can acquire science without the rudiments of education, upon which family property has been expended. Does that cause

his self-acquired property to be brought into hotchpoch and divided amongst his brethren? A father wishes his son to become a member of a learned profession, or to be trained to commercial pursuits. The ancestral property has been spent in preparing him for the position for which he is ultimately destined. He still remains undivided, and has accumulated wealth. Are his acquisitions to be applied to the enrichment of his brothers, simply because he has been taught a profession, or a trade, or has accepted maintenance from the ancestral funds? It is impossible for any man to gain wealth without the ancestral property having in some manner contributed directly or indirectly to its acquisition. Does that give his brothers an interest in his self-acquired property, and a right to share in the distribution of the family property on his partition? Can it confer upon the family a right to participate in his acquisitions, when he is availing himself of nothing more than the law gives him, without exacting any thing from him in return?"

In *Rajmohun Gossain* v. *Gourmohun Gossain* 8. Moore's I. A. p. 91. ancestral property was held to include not only all such property as, the father had derived from his ancestors, but all acquired by the father by whatever title, and possessed by him at the time of his death. But this was on the construction of the particular instrument of compromise in that case, which held this to be the intention of the parties.

Landed property confiscated by Government, and bestowed on a Zemindar, is self-acquired property in his hands.(a) *The Shivaganga Case.* 9. Moore's I. A. p. 539. *The sons of Veeraraga Mulrauze* v. *Ramchundra Rauze.* 1. Mad. S. D. p. 85. See the *East India Company* v. *Syed Ali.* 7. Moore's I. A. p. 555. *Elavambado Morteah* v. *E. Nineappah Moodelly.* 2, Str. N. of C. p. 163. *Koonwar Bodh Singh* v. *Sheonath Singh.* 2. Beng. Sel. D. p. 92. *Mahipat Singh* v. *Collector of Benares and another.* 5. Beng. Sel. D. p. 32. So an Enam which has been conferred on A, after confiscation from B, is A's self-acquisition.

Property acquired by a joint member, without any use of the family funds, by the exclusive industry of the acquirer, is self-acquisition. *Kaleepersaud Roy and others* v. *Digumbur Roy.* 2. Beng. Sel. D. p. 237. *Muddun Gopal Thackoor* v. *Ram Buksh Pandey* 6. Suth. c. r. p. 73. *Govinddas Dhoohebdas* v. *Muha Luksheemee* 1. *Borr. p.* 241. *Lar. Baee* v. *Teharam Gopal.* 2. *Borr.* 309. *Koulnath Singh* v. *Jagrap Singh* 5. Beng. S. D. R. p. 12. *Kishore Moonee Dossee* v. *Sreekunt Sin.* 7 Beng. S. D. R. p. 67. Gifts upon a consideration personal to the donee, as marriage, or the personal regard of a stranger towards him, are self-acquired. Ib.(b)

Possession of one member of a joint-family is, ordinarily speak-

(a) Mit. Ch. I. S. IV 2.
Menu. II. Dig. B. V. Ch. V. S. II. V. 345. 348.
Catyayana. Do do V. 347.
Nareda II. Dig. B. V. Ch. V. S. II. V. 353.

(b) Mit. Ch. I. S. IV. 2. and
Vide (b) last page.

ing, possession of all. *Doed, Ramnant Sett* v. *Balram Chunder*. Mort. p. 80. But when the claimant has been excluded from the family, this rule ceases to apply; and the possession of the others is adverse to him, and cannot enure to his benefit. *Jowala Buksh* v. *Dharam Singh*. 10. Moore's I. A. p. 511.

Liability of joint estate for joint and several family debts:—Joint family property is liable for joint family debts.(a) *Nubkoomar Chowdry and another* v. *Jye Deo Nundy*. 2. Beng. Sel. D. p. 247.

The share of each is liable for his separate debts. *Valayuda Pillay* v. *Chedumbara Pillay* Mad S. R. for 1855 p. 234, 236. See *Goor Surun Doss* v. *Ram Surun Bhukut*. 5. Suth. c. r. p. 54. *Ram Lochun Shaha* v. *Unno poorna Dossee*. 7. Suth. c. r. p. 144. See 1. Morley p. 454. § 26. 2. Macn. p. 294. Each may be liable on his separate bond. *Veerapen Servacaren* v. *Brunton*. Mad. S. R. for 1850 p. 124. *Chundoo Kedawoo and another* v. *Teeroovath Kelloo Coorpoo*. Mad. S. R. for 1854. p. 191. *Soobramanya Pillay and another* v. *Paroonelliappa Pillay* Mad. S. R. for 1851 p. 129.

And the share of each member may be sold in execution for his separate debt. (b) 2. Macn. p. 290. Case 3. In S. A. 33. of 1856. *Chinnapiel* v. *Choiken Shewagaren*. Mad. Sudd. R. for 1853. p. 220. *Virasawmy Graminy* v. *Ayasawmy Graminy*. 1. Mad. H. Ct. R. p 471. So where the right and interest of a father in ancestral property was sold in payment of a debt contracted for the benefit of the family, the sale was held to extinguish the contingent interest of the sons, and to pass to the auction purchaser the right to the possession of the entire property sold. *Balmokund* v. *Jhoona Lall* N. W. Pr. R. for 1856. Case 174.

The debt, to be binding, must have been incurred on a good consideration. 1. Str. 227. Thus such as arise from gaming, purchase of spirituous liquors, immorally luxurious extravagance, and the like, are excluded;(c) and even where the consideration is good as for the nuptials or other ceremonies of the family the expense must still be reasonable, according to the means and usage of the family. ib. Money borrowed to pay Government kist is for a good consideration *Gopee Churun Burral* v. *Mt. Lukhee Ishwuree Debia*. 3. Beng. S. D. R. p. 93. These principles receive frequent illustration in those cases in which minors on coming of age seek to set aside debts contracted by their guardians: where the heirs of the husband contest the acts of his widows; and where the successors to Zemindaries seek to escape the very heavy liabilities with which they find them burthened by their immediate predecessors.

An arbitrary deduction from a creditor's bill was held not to be binding without his consent. *Dada Bhaee Ruttenjee* v. *Nimwoo* 2. Bor. p. 339.

(a) Vyavahara Mayuka. Ch. IV. S. VI. 1 & 2. Yajnyawalkya. I. Dig. B. I. Ch. V. V. 180.
Nareda. Do do V. 181
(b) Nareda I. Dig. B. II. Ch. IV. S. I. V 6.
Dayacrama Sangraha. Ch. XII. S. 1. 9.
(c) Vrihaspati. I. Dig. B. I. V. 201.
Gautama. Do. V. 202
Vyasa. Do. V. 203.
Yajnyawalkya, Do. V 205.

Where one member has to pay the family debt, the other members are liable to be called on to contribute their respective proportions.(a) *Domin Singh and other.* v. *Kasee Ram and Toolsee Ram* 1. Moore's I.A.p.366. *Golinknath Bose* v. *Rajkissen Bose.* 1. Fult. p. 401. *Venkatakishnyengar* v. *Narayen.* 2. Str. 270. *Kistniengar.* v. *Vurdyengar* ib. 272. In *Nubkoomar Chowdry* v. *Jye Dio Nundee.* 2. Beng. Sel. D. p. 247, the Court on appeal disallowed that part of the decree which allowed the defendants to recoup the sum they were compelled to pay, from their brother's estate: probably because such a declaration was not called for in the suit; but it is conceived they would have been entitled to contribution from their brother's estate. So a son paying his father's debt is entitled to retain beside his own share sufficient of the family property to reimburse him his share of the payment. 1. w. and Bühl. p. 30, *Kattapermall Pillay* v. *Punchanaden Pillay.* 3 Mad. H. Ct. R. p. 339. In a suit for contribution, the Decree must specify the share which each member has to contribute. *Shaik Otioolah* v. *Mt. Asseerun.* 7. Suth. c. r. p. 19 4. *Khemia Debia* v. *Kumola Kunt Bukshee* 10. Suth. c. r. p. 10. But see *Mt. Jumeelun* v. *Wulle Ahmed.* 10. Suth. c. r. p. 31, where it was held that it was not wrong to decree a lump sum against one representative of the deceased though he had several representatives.

But it must of course be a family debt: if a joint member buy articles for his own sole private use and gratification, and execute a bond, promising to pay the value of the articles, the co-parceners of the debtor are not liable. *Veerapen Sevacaren* v. *Brunton.* Mad. Rep. for 1850. p. 124.(b) *Timmara* v. *Vencappah* 2. Str. p. 444, where a son was held not answerable for debts contracted by his father for purchase of spirtuous liquors, or debauchery, or other improper objects. And in Sp. A. 15 of 1850. *Soobramanyen Pillay and another* v. *Paroonelliappa Pillay* Mad. S. R. for 1851. p. 129, where a suit was brought against two undivided brothers on a bond signed by one only, he who had not signed was relieved from all liability, in absence of proof that the money borrowed was "for the benefit of the family." Where money was borrowed by a near relative of a joint-family, holding part of the ancestral property, and appearing before the world as a co-parcener to pay of a *bonâfide* ancestral debt, it was held to be a family, and not a personal debt. *Buldeo Ram Tewarre* v. *Somessar Pauray.* 7. Suth. c. r. p. 490. Where a division has taken place, all the members of the family continue liable nevertheless in respect of all transactions with the family in its undivided state. *Tylummal* v. *Ragopaty Iyen.* S. A. 106 of 1858 Mad. S. R. for 1858 p. 208. 2. Macn. p. 280.

The general proposition is that "debts follow the assests into whosoever's hands they come." 1. Str.

(a) Nareda. I. Dig. B. I. Ch. V. V. V. 169. 183.
Catyayana. B. I. Ch. V. V. 194.

(b) Yajnyawalkya. I. Dig. B. I. Ch. V. V. 180.
Nareda. Do do V. 91

p. 227. (a) ib. p. 120. And it is to this extent that an heir or representative is bound to pay his ancestor's debts. *Tarmoomah Rau* v. *Mudden Day* Hyde's Notes, *Banarassy Ghose* v. *Ramtonoo Dutt* Chamb. Notes ib. 1. Morel. Dig. p. 195. § 1. 2. Macn p. p. 277. 283, 287. *Erapah* v. *Ackamah* 2. Str. 354. But in *Unnopoorna Dassea* v. *Gunga Narrain Paul* 2. Suth. c. r. p. 296, it was questioned if this proposition is not too broad, and whether the principal had not been carried too far. There it was held that where the property had been sold for a valuable consideration to a b. f. purchaser without notice, the assets could not be followed in his hands, though the creditor had still his personal remedy against his debtor. The Court said, "On the *second* ground, we think that, in our judgment of 9th June 1864, we carried the doctrine of the liability of an heir under the Hindoo Law to pay the debts of his ancestor, too far. There is, no doubt, a moral obligation to do so; but we do not find, nor can the pleader shew us from any text of Hindoo Law, that the property of a deceased person is so hypothecated for his debts, as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it and take it out of the hands of a third party who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt, if he have alienated the property, but he cannot, we think, follow the property." The assets are persuable, into whatever hands they come *Erapah* v. *Ackamah* 2. Str. p. 354, but in *Unnopoorna Dassea* v. *Gunga Narrain Paul, supra;* See *acc. Oomed Rai* v. *Heera Lall.* 6· N. W. Pr. R. p. 218. *Ram Golam Debey* v. *Ayma Begum.* 12.. Suth. c. r. p. 177, where a defendant against whom a decree had passed in his representative capacity, had made payments in satisfaction of the decree to the full value of the property of the deceased which had come, or, but for the default of the defendant might have come, to his hands, the decree could no longer be executed, even although the decree-holder might be able to prove that the defendant still had in his possession property which originally belonged to the deceased.

Heirs with assets are liable.(b) *Dwarkanath Soor* v. *Goonomonee Debia.* 1· Morley Dig. n. s. p. 136. § 5. *Kunya Lall* v. *Bukhtawar Sing* ib. § 6. *Nubkishwar Biswas* v. *Ramjoy Ghose.* ib. § 7.

The son is liable for his father's debts.(c) *Kottala Uppi* v. *Shangara Varma* 3. Mad. H. Ct. R. p. 161. *Jamoonauh Raur* v. *Mudden Day* Hyde's notes of cases. 1. Morl. Dig. p. 195. § 1. *Banarassy Ghose* v. *Ramtoonoo Dutt* ib. *Mooktakeshee Debia* v. *Noma Churn Bhuttachargee.* 12. Suth. c. r. p. 233. But an adopted son is discharged from paying his natural father's debts, he taking no portion of the natural father's property.(d) *Kasheepershad* v. *Bunseedhur* 4. N. W. P. R, p. 240. 2. Str. p. 346, where the Pundit says that the obligation is independent

(a) Vishnu. I. Dig. B. I. Ch. V. V. 220.
Yajnyawalkya Do V. 171.
Nareda. Do V. 172

(b) Do
(c) Yajnyawalkya. I Dig. B. 1. Ch, V. V. 170.
(d) Menu. IX. 142.

of assets; but *Colebrooke* in his note observes that the obligation is one of a moral and religious, not a civil obligation.(a) *Timmanah* v. *Vencapah* 2. Str. p. 349. ib. p. 351. in which the grandson with assets is held liable. But according to the *Mahratta* school a grand-son is bound to pay his grand-father's debts, though without interest, independent of assets.(b) In *Narasimhara Krishna Rao* v. *Antajei Virupaksh and others*. 2. Bomb. H. Ct. R. p. 64, it was expressly so decided. But the creditors must wait till the heir has acquired enough to pay them. *Huree Kussun* v. *Runchor* 1. Morl. Dig p. 196. § 4, and in *Kasi Laksmyputty, Shastrulu* v. *P. Buchireddy* Sp. A. 9-59. Mad. S. R. for 1860. p. 78, it was held that an heir with assets is liable though the assets have been subsequently lost or destroyed. But the property, not the person of the heir is liable. *Manukchund Purbhoo* v. *Deokristen Toolljaram*. 1. Morl. p. 195 § 3. In *Hurbajaee Raojee* v. *Hurroogind Trikundass* Bellas. p. 76, a son was held liable for his father's debts without assets.

The proposition that heirs with assets are liable was broadly laid down in *Raj Roop Sing* v. *Buldoe Sing* 2. Suth. c. r. p. 258. and see *Cheydulol* v. *Mt. Sunja Terwarim*. 1. N. W. Pr. R. p. 107.

But in *Lewis Cosserut* v. *Sudabutt Pershad Lalla*. 3. Suth. c. r. p., 210, it was held that a co-sharer's estate under the *Mitacshara* Law cannot be held answerable, after his death, for debts contracted by him during his life, but that the estate passes to the survivor free of all charge or responsibility.

It was not necessary as it appears to me to rest this case upon any such principle, which may well be questioned; because the debt was contracted by the widows of the co-sharer A, and they clearly could not validly charge the joint estate: and though it was alleged that the money was borrowed by them to pay of their husband's debts, yet these very debts were contracted by him after the family had become seperate. In the case under review, the Court went on the hypothesis that under the *Mitacshara* an undivided member cannot alienate without consent of the co-sharers, even his own share. The Court said; "We come lastly to the appellant's contention that, setting aside the mortgage and all rights derivable from it, they are entitled to recover their money from Sudabut Pershad as creditors of the estate to which he succeeded.

"It being proved (and we are not disposed to question the lower Court's finding on this head) that the 25,000 rupees were advanced for the benefit of of Bhuzwan Lal's estate, and were actually paid to his creditors, Suddabert, as heir of that estate, is liable to the extent of the assets that have descended to him.

"The debts to the payment of which the 25,000 were applied, were all contracted by Bhuzwan Lal after the family became separate, after 1846 that is, and were, therefore, personal and not

(a) Catyayana. I. Dig. B. 1. Ch. V. V. 173.

(b) Catyayana. I. Dig. B. 1. Ch. V. V. 146 147.

joint liabilities, and the question that remains is, can an estate according to the principles of Mitacshara Law, be burthened with the debts of one of its joint-owners, after that person's decease?

"The precedents that have been quoted to us, do not appear to touch the question. They all relate more or less to the dogma that, under the Mitacshara Law, alienations by one of the family are invalid unless with the consent of the other members; and one of them (Agra Sudder Dewanny Adawlut 1864, page 299) lays it down that alienation of joint-property even to the extent of the alienor's own share is invalid without such consent.

"But although these cases do not actually provide for the circumstances now before us, we think that they do lay down, though indirectly, the principle to be followed. By the Mitacshara Law all members of the joint-family have a continuing interest in the whole of the family estate; one member cannot alienate even his own share without the consent of all; and nothing but the most urgent necessity legalizes any transfer to third parties. Each member has a life-interest and no more in the property; and interest which he can either give away during his life-time, nor will away after death, but which must go to the survivors of the joint-family.

"And if a joint-tenant, such as Bhugwan Lal was, had no powers to raise money by alienating his own share even of the joint estate during his life, it seems to follow naturally that he could not burthen that share with the payment of his personal liabilties after his death. His co-sharers had a vested right in that share, and were entitled to receive if free and unencumbered of everything except debts incurred for the benefit of all the partners.(a)

"Personal debts must, by the law we are to administer in this case, follow personal and separate assets, and the widows only therefore are liable."(b)

The whole question and all the principal cases came under review in *Sadabat Prasad Sahu* v. *Foolbask Koer* 3. Beng. L. R. p. 31, before a full Bench. There, a member of a Hindu family, living under the Mitacshara law, and having joint-family property, died entitled to an undivided share in such property, leaving two widows, him surviving. The widows were sued in their representative capacity in respect of debts incurred by him during his life-time, on his own account, and decrees were obtained against them. In execution, an interest in certain portions of the joint-family property, to the extent of the share to which the deceased was entitled in his life-time, was sold, and the auction-purchasers obtained possession of it. It was held, that the share of the deceased did not at his death pass to his widows, but that (there being no male issue) it passed to the remaining members of the family by survivorship, and could not be remembered liable to the debts of the deceased in a suit against his widows.(c)

(a) Mit. Ch. I. S. I. 3, 27, and 30,
(b) Yajnyawalka. I. Dig. B. I. Ch. V. V. 171
Nareda. Do do V. 172.
(c) Mit. Ch. II. S, I. 30.
Yajnyawalkya. I. Dig. B. I. Ch. V. V 180

The question whether those who take by survivorship are liable for the debts of the deceased parcener to the extent of his share was quæried, but not decided.

There *Peacock* C. J. said,

"If the estate of the deceased goes over by survivorship, how can it be said, when you seize the share of the deceased after his death, that you are seizing the property of the deceased, or the property of his heirs or representatives? You are seizing the interest which has passed to the survivors by survivorship."

"It may be that the law does not make any difference as to the liability of the property to satisfy the debts of the deceased, whether it passes to heirs by inheritance, or to survivors by survivorship; and that the survivors take it charged with the debts of the deceased, in the event of his having no other assets. I express no opinion upon that point. It is stated in the Treatise of Yajnawalkya (I am not reading now from the Law of Inheritance, but from that part of the work of the author which treats of the payment of debts, published by Mr. Roer and Mr. Montriou), in text No. 51 :—'He who takes the 'property of one who leaves no '(capable) son, shall pay the 'debts,' that is the debts of the dec eased; 'so he who takes, or 'marries, the widow; also that 'son whose personal estate no 'other has appropriated, and 'who in such case shall always 'be deemed fit to inherit pro-'perty,' that is to say, he who marries the widow is also liable to pay the debts out of the assets which would have ben available if he had not married her. Also he says, 'If one die without any son, then whosoever succeeds to the property.'

"According to this doctrine, whosoever succeeds to the property is liable to the extent of that property to pay the debts.

"I express no opinion upon the subject, because the case has not been argued, and does not arise in the present suit."

See *K. Subba Chetty* v. *Maste Timmadi Rauze* 3. Mad. H. Ct. R. p. 306, where the Court, questioned whether a Pollium, in the hands of one who took not by descent, but government grant, would be liable for the debts of the former holder. Whether the *income* could be liable for the father's debts in the hands of the son, it was not necessary to consider. And see and consider *Olagappa Chetty* v. *Collector of Madura*. 4. Mad. Rev. R. p. 173.

Again, as to the question, whether the parcener's share might have been seized in execution during his life, *Peacock* C. J. in 3. Beng. L. R. p. 31 said, "It is unnecessary for us to decide whether, under a decree against Bhagwan in his life-time, his share of the property might have been seized, for that case has not arisen. According to a decision in Stoke's Reports, it might have been seized; but the case as against Bhagwan and that against the survivors is very different. So long as Bhagwan lived, he had an interest in this property which entitled him, if he had pleased to have demanded a partition, and to have had his share of the joint estate converted into a separate estate."

And see 2. Macn. p. 279, case

III and note to p. 280 which seems expressly in point.(*a*)

There it is stated that, "it is unquestionable, that the brothers who took the estate are liable for the debts, as far as there may be assets, whether the money was borrowed by the deceased brother for his private use alone, or was expended for the benefit of the family at large." See *Yerrumah* v. *Sinjavee*. 2. Str. p. 355.

A widow is liable to the extent of assets received from her husband. 2. Str. p. 353. She is not liable to pay her husband's debts out of her separate property, unless she has made herself liable by special agreement to that effect. 2. Str. p. 352. 2. Macn. p. 383.(*b*)

In 2. Macn. p. 278. Case. 2, it is said, "It is a general principle in law, that a wife is incompetent to contract a debt, or to execute any obligation; but if a debt be contracted by a woman of any of the superior tribes, such as a *Brahminee* or a *Cshatria*, for the support of the family, it must be liquidated by the husband. The husband, however, is liable for any debt contracted by his wife, she being a woman of certain of the inferior classes, such as a milkwoman, &c. whatever may have been the purpose for which the money was borrowed, because the whole of their concerns is under the management of their wives."

The following texts are given 'The text of *Yajnyawalkya* laid down in the *Mitacshara*:—"Neither shall a wife nor mother be *in general compelled* to pay a debt contracted by her husband or son, nor a father to pay a debt contracted by his son, unless it were for the behoof of the family, nor a husband to pay a debt contracted by his wife."

The passage of *Vishnu* quoted in the *Viramitrodaya*: Neither 'shall a wife nor mother *be in general compelled* to pay the debt of her husband or son, nor the husband or son to pay the debt of his wife or mother."

Vrihaspati:—"A house-keeper shall discharge a debt contracted by his uncle, brother, son, wife, servant, pupil, or dependants, for the support of the family *during his absence*."

'*Nâreda*:—"Whatever debt has been contracted for the use of the family by a pupil, an apprentice, a slave, a wife or an agent, must be paid by the head of the family."

'*Menu*:—"Should even a slave make a contract *in the name of his absent master* for the behoof of the family that master, whether in his own country or abroad, shall not rescind it."

Yajnyawalkya:—If the wife of a herdsman, a vintner, a dancer, a washerman, or a hunter contract a debt, the husband shall pay it; because his livelihood chiefly depends on the labour of such wife."

'*Catyâyana*:—"The husband, being a vintner, hunter, or fowler, a washerman, a herdsman, a shepherd or the like, shall, pay the debt of his wife; it was contracted in the concerns of the husband."

And the following note is appended: "The Hindoo law in

(*a*) Narcda. I. Dig. B. II Ch. IV. S. I. V. 6. (*b*) Catyayana, I. Dig. B. I. Ch. V. V. 212.

this particular seems to be in unison with the principles of English jurisprudence. "A married woman set over the affairs of the house-hold; or of the whole or any portion of her husband's business or trade, binds him by the contracts which she makes respecting matters committed to her management. He is considered to contract through her ministry. In this case, likewise, as well in the case of necessaries supplied by the wife, there is no rescission at her husband's instance or her own, for want of his special and express sanction." —Colebrook's Treatise on Obligations and Contracts, Part 1st, page 233."

Where a wife manages her husband's affairs, he is answerable for the debts she contracts. *Buksheeram* v. *Mt. Durboo.* Ib. p. 281. (a)

A husband is liable for his wife's debts under certain circumstances.(b)

It has been said that a creditor must sue the principal first, before he can come upon the surety. *Bahee Shah Keshoor* v. *Rajkoonwar.* 4. Borr. 93. Ib. 1. Morl. D. p. 196. § 5. But in *Totakot Shangunni Menon* v. *Kurusingul Kaku Varid* 4. Mad. H. Ct. R. p. 190 it was held that a suit may be maintained against a surety according to Hindo Law, although the principal debtor has not been sued. There the Court said;

"Next as to the objection that the suit did not lie until after the principal debtor had been sued. The single authority for the position laid down in *Sir Thomas Strange's Treatise,* on which the Civil Judge has relied, appears to be the texts of *Vrihaspati* with the commentary of *Jagannada* in *Colebrooke's Digest Sk.* 1, *Ch.* 4, *Section* 2, *Clause* 148:—Let the creditor allow time for the surety to search for the debtor who has absconded fortnight, a month, or six weeks, according to the distance of the place where he may be supposed to lurk.

"Let no sureties be excessively harassed, let them gradually be compelled to pay the debt, let them not be attached if the debtor be at hand and amenable: such is the law in favor of sureties."

"The first of these injunctions evidently relates to suretyship for the appearance of a debtor which is according to *Vrihaspati* one of the four kinds of legal suretyship, and renders the sureties liable on failure of their engagement to pay the debt (*See the same Chapter of Colebrooke's Digest Clause* 142); and it seems questionable whether the other injunctions have reference to any other kind of suretyship. At all events they do not, we think, imply the rule of law now contended for. The injunction "let them not be attached if the debtor be at hand and amenable" alone imports that the principal should be proceeded against, and that, if a prohibition at all, amounts to an absolute prohibition of the liability of sureties when the debtor is at hand and

(a) Vrihaspati. 1. Dig. B. I. Ch. V. V. 189. 218.
Nareda. Do. do. V. 191. V. 209.
Yajnyawalkya. I. Dig. B. I. Ch. V. V. 207, 216.
Vishnu. Do do V. 208.
(b) Catyayana 1. Dig. B. 1. Ch. V. V. 219. Vyavahara Mayuka, Ch. V. 20.

amenable which is certainly not a benefit available to the present defendants. The terms in which the injunctions not to harass excessively and to compel payment gradually are expressed are too vague to admit of any definite construction. We are unable therefore to consider these texts as authority for the position that sureties cannot be proceeded against before the principal debtor has been separately sued, and all the other texts set forth in the same chapter of the *Digest* relating to the liability of sureties declare generally that sureties for payment by their principal are liable on his default.

"The Hindu Law then being, in our view, not opposed to the rule of the English Law by which either the principal or the surety may be sued at the election of the party with whom they have contracted, is there any other ground on which its application to this and similar cases can be considered unjust? The principle of the rule is that the contract imposes on the surety the obligation to see to payment or performance on the part of the principal, and this is no more than the just effect of a contract of suretyship, such as the one in question. When the contract is silent in regard to a suit against the principal, suing the surety is but seeking to enforce the liability incurred by the undertaking of the latter. It is true that eventual indemnity from loss is the substantial object of the collateral contract of a surety; and therefore in accordance with perfect equity that the defaulting principal should be sued, but only when he is shewn to have the means of meeting his liability, and this appears to have been the extent of the benefit secured to the creditor by the *beneficium ordines* or *excussionis* introduced into the Roman Law by the *Novellae Constitutiones of Justinian, Nov.* 4 *Ch.* 9. The surety was liable to be first sued, and the action being *stricti juris*, it was for him to plead the *exceptio ordinis*, otherwise the suit proceeded to Judgment, and he could not successfully plead it when it appeared that the plaintiff would be ineffectual, for then *iniquum tse eum condemmari* could not be declared. The effect of the law is concisely stated in *Colquhoun's Roman Civil Law, Vol.* 8, *Sec.* 1860.

"The justice of such a rule of procedure lies in the sureties being secured the right to insist on the payment by the debtor in their discharge to the extent of his means. Now there is no doubt that in practice when the principal debtor is not sued, it is, at all events in the majority of instances, because he has no property available to meet his liability. It is most probably so in the present case. The positive general rule contended for would therefore not only be without the principle of equity in favor of sureties to support it, but would also subject creditors inequitably to the expense and delay of useless suits. Further in any case of the omission to sue a principal who possesses the means of paying, the Code of Civil Procedure supplies the surety with a remedy. He can, when sued, compel the creditor to obtain a decree against the principal debtor according to the justice of the case, by having him made a party to the suit under Section 73, and this re-

medy, we think, secures all just and reasonable protection consistent with the several rights and liabilities under the contract.

"For these reasons we are of opinion that the rule of English law should govern our decision, and consequently that the respondent's objection is untenable." And see acc: *Luchman Joharemal* v. *Bapu Kander*. 6. Bomb. H. Ct. R. a. c. j. p. 241.

The debts of a missing person must be paid by those in possession of his estate, without waiting twelve years for his reappearance. Ib. p. 282.(a)

The members of a *Tarawád*, in taking possession of the estate of the deceased *Karnaven*, render themselves responsible for the debts he had incurred in the management. *Chenkaren Orkateny Coonley Akmond* v. *Narasimagee Mookhtar*. Mad. S. D. for 1849. p. 17.

A father is not liable for his son's debt, unless he have received assets, or the debt was contracted for family use, or for religious observances, which it was incumbent on the family to perform. 2. Macn. p. 286.(b) Where money was borrowed for the payment of Government Kist by one erroneously registered as proprietor of an estate, the rightful proprietor on coming into possession was decreed to pay the debt. *Gopee Churrun Burral* v. *Mt. Lukhee Jishwuree Debia*. 3. Beng. Sel. D. p. 93. So where a widow borrows b. f. for necessary purposes, the heir of the person from whom she takes, is bound by the debts on his succesion. *Dwarknath Soor* v. *Goonoomony Debia*. 1. Morl. Dig. n. s. p. 136. § 4. The debts of an ascetic follow the assets in the hands of his representative. 2. Mac. p. 288.

There are several decisions in the Madras Sudder Reports, which hold that where a debt is evidenced by writing; it can only be shown to be discharged by written, and not by parol evidence. This principle was held to extend to Bonds, Benamee transactions, and the like. This doctrine has been expressly swept away by the High Court. *Mantena Rayaperaj* v. *Chekuri Venkataraj*; 1. H. Ct. R. p. 100. The old cases, which are very numerous, are not specified here; nor would the subject be alluded to, but for the purpose of warning students who may meet with these cases, that they are not, and never were law.

Re-union:—Re-union takes place where, after division, (to be next considered) the family or certain members come together again.(c) Cases of this sort do not often occur. In *Tarachund Ghose* v. *Pudum Lochun Ghose*. 5. Suth. c. r. p. 249. s. c. Wym. c. r. p. 329, the whole of the authorities were reviewed, and the Court held that in a Hindoo family where re-union has taken place among certain members after partition, the members of the re-united family and their descendants succeed to each other to the exclusion of the member of the unassociated or not re-united branch.(d) There the Court said,

"Re-union does not seem to take place frequently among

(a) Vishnu. I. Dig. B. I. Ch. V. V. 220.
Catyayana. Do do V. 238.
(b) Yajnyawalkya. Do do V. 207.
Vrihaspati. Do do V. 214.
Catyayana. Do do V. 215.
Nareda. Do do V. 294.
(c) Mit. Ch. II. S. IX 2. do.
(d) Mit. Ch. II. S. IX. 4.

Hindoos in the present day, if we may judge from the scarcity of reported cases in the Courts which have any bearing upon the subject. Nevertheless, there is no doubt that re-union has always been recognised by the Hindoo law, and that the right of succession is affected by it. Indeed, if the re-union be recognised at all, we certainly should expect to find that it affected the law, of inheritance, when we consider the general principles on which that law is founded, and when we bear in mind the extent to which joint-tenancy among members of the same family is favoured by the Hindoo law. Sir Francis MacNaghten, in his "Considerations on Hindoo Law," page 107,—admitting that he knew of no instance of re-union after partition, and that the Pundits had not been able to inform him of any such case,—makes some attempt to lay down the law as to re-union and its effects: practically, however, he does nothing beyond placing together a series of contradictory texts and calling attention to the endless confusion which exists on the subject. We are far from saying that the law is clearly or satisfactorily laid down in the books of those writers who are deemed authorities on Hindoo law. The texts are in many respects obscure, inconsistent, and confused. But however unfrequently cases of re-union may be met with, still, when a case of it does occur, the ancient Hindoo law, if it can be discovered, must be applied to it. The conclusion at which he have arrived on the present occasion, is the result of a general consideration of all the authorities, and of the principles on which re-union, and the few rules as to inheritance in re-united families which are distinctly given, are based.

"In the Dyabhaga, Chapter XI, Section 6, para. 39, we find it declared: "If there be competi-
"tion between claimants of equal
"degree, whether brothers of the
"whole-blood or brothers of the
"half-blood, or sons of such bro-
"thers, or uncles, or the like, the
"*re-united parcener shall take the*
"*heritage;* for the text does not
"specify the particular relation,
"and all these relations were
"premised in the preceding text,
"and a question arises regarding
"all of them: therefore the text
"must be considered as not relat-
"ing exclusively to brothers."

"This paragraph is directly in favor of the appellant, and there is nothing to alter its effect in the preceding paras. 26-38, which all have, more or less, bearing on the question. For the respondents it is argued, that it is only as between the persons actually named in these texts, *i. e.* brothers, uncles, &c., that re-union causes any change in the rule of inheritance.

"But it appears to us that, though the texts may limit the classes of persons to whom it is permitted to re-unite themselves, they do not limit the continuance of the re-union once properly effected: in other words, we think that, if a re-union actually takes place between the proper parties, their representatives and descendants, however remote, will remain joint until a fresh partition takes place, exactly in the same manner as in an ordinary case of a joint-family the members remain joint until partition.

"The Dya-krama-Sangraha,—which we construe as we do the Dyabhaga,—likewise generally supports the appellant's case (*See*

Chapter V, para. 8, and the other paras. of that Chapter); so also does the rule as stated in the Vyavastha Durpana of Baboo Shama Churn Sircar. And Colebrooke's Digest, Book V, Chapter VIII, Section 1, para. 433, pp. 561, 562 (Madras Ed. 2nd Volume) does not seem opposed to it, although so expressed as to be almost wholly unintelligible.

"The text books of the other schools of Hindoo Law lead to the inference that, according to those schools also, the appellant, if re-united as alleged, would take the inheritance (Mitacshara, Chapter 2, Section 9; Vyavahara Mayukha, Chapter IV Section 9 Vivada Chintamoni, Chapter "On succession to property of re-united parceners," page 304).

"In the second Volume of Macnaghten's Hindoo Law, page 72, there is a case which is very much to the point. Five brothers having separated, two of them re-united. One of them having died childless, it was held that the sons of the re-united brother took, to the exclusion of the sons of the other brothers: the "property should "devolve on his re-united bro-"ther only, on whose death his "son alone is entitled to the suc-"cession. The sons of the "unassociated brothers have no "title thereto." So, in another case at page 173, three brothers in the life-time of their father, caused him to divide his estate among them, and from that time one brother lived apart, and the other two lived together as a united family. After the father's death, one of the united brothers died childless. It was held that, if their was no clear evidence of re-union, *all* the brothers of the deceased would share equally, but if there were particular evidence of an express and distinct re-union, then the associated brother alone succeeded, to the exclusion of the unassociated brother.

"In a case in the High Court at Madras (Stokes' Reports, Volume II, page 235) to which the Mitacshara Law would be applicable, the question of the right to succeed by reason of re-union was raised, but it was not decided, because it was held that the re-union was not proved.

"On the whole, although we have been referred to no decided cases which completely support the appellant's contention, and although we know of none save those which we have quoted, we are of opinion that, if he can establish the re-union, he is entitled to succeed, to the exclusion of the plaintiffs."

See also *Kuta Bully Virayah* v. *Kuta Chuddapa Vuthamulu*. 2. Mad. H. Ct. R. p. 235, where the point arose, but was not decided.

Where a family re-unites the presumption arises, that they are joint in interest. The re-uniting remits them to their former *status*. *Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry*. 10. Moore's I. A. p. 403. s. c. 5. Suth. P. C. p. 11.

The re-union must be satisfactorily established by proof. *Gopal Chunder Daghoria* v. *Kenaram Daghoria*. 7. Suth. c. r. p. 35, and the Court, following the case in 5. Suth. it was held that, when such re-union is satisfactorily established, Courts are bound to give a preference to the re-united parceners, to the exclusion of the members or their issue who have not been so re-united. See acc. 2. Macn. p. 173, 174. In *Kuta*

Bully Virya v. *Kuta Chuddapavuthamalu.* 2. Mad. H. Ct. R. p. 235, where a division took place among members of a family, one of whom was a minor, the circumstance that the minor and his father continued to live together, and their shares became mixed, was held no *proof* of reunion between them, but only evidentiary matter to prove reunion. In *Merabarsu Mahaputtar* v. *Nandkishen Mahaputtar.* 3. Beng. L. R. a. c. j. p. 7. (which was not a case of re-uniting, but brothers remaining joint against a brother who separated himself) the Court touched on, though it did not decide, the question of the effect of re-union. Neither of the cases in *Sutherland* appear to have been cited; but the case of *Janbudchunder Ghose Mutty Lal Ghose and another* v. *Benadbcharry Ghose.* 1. Hyde. p. 214, before Mr. *J. Wells,* (not a case of reunion but in which the doctrine of re-union was considered) was relied on. In *Visvanath Gangadhar* v. *Krishnaji Ganeesh.* 3. Bomb. H. Ct. R. a. c. j. p. 69, it was held that to constitute a reunion it must be made by the original parties who separated. Their descendants may re-unite, if they please; but such a re-union does not affect the inheritance. There *Couch, C. J.* said,

"There is little to be found in Hindu law-books on the subject of re-union, and scarcely any reported cases in the courts bearing upon the subject. In *Tarachand Ghose* v. *Padam Lochan Ghose* it was considered, and it was held that where re-union has taken place among certain members of a Hindu family after partition, the members of the reunited family and their descendants succeed to each other, to the exclusion of the members of the branch not re-united.

"The effect of re-union is important in considering in what cases it is allowable, as it does not merely affect the interests of the parties to it. We proceed, then, to consider in what cases there may be such a re-union.

"In 1 Strange's Hindu Law, 233, it is said: "Not only may an original partition be re-formed by means of a supplemental one, but there may be an entirely new one upon a re-union of any of the separated parceners, competent to the purpose, and this, as well after partition by a father, as among co-heirs."

"Sir Francis Mac Naghten, in his Considerations on Hindu Law, p. 107, says: "After separation, and a partition actually made, families may be again united. This, however, is an event which seldom happens. I do not know an instance of it, and the Supreme Court's Pundits inform me that none has ever fallen within their knowledge."

"In the *Mitácshará* on Inheritance, Cha. II., Sec. IX., 3, it is said: "That (re-union) cannot take place with any person indifferently; but only with a father, a brother or a paternal uncle: as Vrihaspati declares, 'He, who, being once separated, dwells again through affection with his father, brother, or paternal uncle, is termed re-united.'"

"In the *Vyavahar Mayúkha,* Chap. IV., Sec. IX., 1, there is this passage: "Now we proceed to expound the doctrine of reunited co-parceners. On this subject, Vrihaspati defines reunion: 'He who, being once separated, dwells again, through affection, with his father, brother, or paternal uncle, is termed re-united.'" This re-union, according to the

Mitákshara and others, can only take place with a father, brother, or paternal uncle, not with others, because no others are included in the text. But the proper sense is, that this [re-union] arises even from the joint location of the makers of the [first] partition. For the words father, and the rest, are merely as a part to denote the whole, of the persons who make the partition, after the example, 'As measures the altar, half within, and half without:' otherwise, there would be a division of the text itself [into three.] Hence, re-union may take place with a wife, a paternal grandfather, a brother's grandson, a paternal uncle's son, and the rest also. 'He who, being once separated [from the co-heirs] dwells again [in common, is termed] reunited:' from joint location [of such an one], the sense of separated brothers, [one's own] sons, and the like, does not result." This author differs from all others in his doctrine.

"In the *Dáyabhága*, Chap. XII., 4, after quoting *Vrihaspati*, it is said: "A special association among persons other than the relations here enumerated, is not to be acknowledged as a re-union of parceners: for the enumeration would be unmeaning."

"The following passages from the *Dáya-Krama Sangraha*, Chap. V., show what the author understood by the term "reunited" in *Vrihaspati*. After quoting the passage, he says—

"3. Therefore where a person has been once disunited from his father and the rest;—afterwards the former partition is annulled by mutual consent of the separated parties, and in consequence of an agreement being concluded to the following effect, 'the wealth which is thine is mine,—that which is mine is thine,' they resolve on dwelling in the same abode. This is considered reunion.

"4. Here, since the father and the others are particularly specified, re-union takes place with those who are alone described, and not with nephews and the rest who are not named; otherwise the specific mention of father and the others would be unmeaning. Such is the opinion according to the Dayabhaga.

"5. The followers of the Mitthila school are of opinion, that the use of the term father, and the rest, is figurative, and that re-union takes place, when those, whose right to a share of the common property is established by their birth, re-association, after having once separated; consequently that re-union can occur with nephews and the rest."

"It appears to us that the meaning of the passage from *Vrihaspati* which is the foundation of the law is, that the re-union must be made by the parties, some of them, who made the separation. If any of their descendants think fit to unite they may do so; but such a union is not a re-union in the sense of the Hindu law, and does not affect the inheritance." See Str. Man. 273.

Where family has re-united, it may impress on the family property by common consent such trusts as the Law will support. *Srimati Sukhimani Dasi* v. *Mahendranath Dutt*. 4. Beng. L. R. P. C. p. 16. The whole of the members may re-unite, or only part. ib. There the Court said,

"A Hindu family, consisting of persons in this near connection may re-unite; part also may reunite; and such re-united members may impress on their united property by common family consent such trusts as their law will support."

APPOVIER ALIAS SEETARAMIAH V. RAMA SUBA AYAN.

11. MOORE'S INDIAN APPEALS PAGE 75. (S. C. 2. MADRAS JURIST PAGE 421. 8. SUTHERLAND P. C. 1.)

APPOVIER *alias* SEETARAMIER—*Appellant*;
AND
RAMA SUBBA AIYAN, VENKATARANA AIYAN, ANANTAMMAL, ANNA AIYAN, AND ANANTANA RAIYANA AIYAN, *Respondents.**

On appeal from the Sudder Dewanny Adawlut at Madras.

According to the true constitution of an undivided Hindoo family, no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property, that he has a certain definite share.

The proceeds of undivided property must be brought to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of the family. But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and each member has thenceforth a definite and certain share in the estate, which he may claim to receive and enjoy in severalty, although the property itself has not been actually severed and divided.

Where, therefore, a deed of partition was made and executed by the members of an undivided family, dealing with and making actual partition of a portion of the joint estate, but leaving the remainder to be divided at a future period in the same manner; Held, by the Judicial Committee (affirming the judgment of the Courts below), that such deed, being a division of right, operated as a conversion of the tenancy and a change of status in the family, quoad

* Present: Members of the *Judicial Committee*—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.
Assessor:—The Right Hon. Sir Lawrence Peel.

the property specified, changing, as it were, the joint tenancy thereof into a tenancy in common; and by operation of law making the members of the previously undivided family a divided family, in respect of such property.

In this case the suit was brought by the Appellant in the Court of the Principal *Sudder Ameen* at *Tinnevelly*. The object of the suit was to establish his claim, as a member of an undivided Hindoo family to a moiety by right of inheritance of the family property, and to eject three of the Defendants (the present Respondents) from the three several divided shares which they held of such property, under a deed of partition made in the year 1834, to which deed the Appellant was a party.

The validity of the partition made in pursuance of this deed was the main question in the suit. The Appellant sought to invalidate it, principally on the ground that such deed of division being only partially acted on was, therefore, wholly void; that certain adoptions, by which three of the parceners became members of the family when undivided, were contrary to Hindoo law; that the Appellant was a minor at the date of that partition; and in the event of those points being decided in favor of the appellant, he supported his claim to a moiety of the property by relying on a partition alleged to have been made in the year 1806, by the then members of the family.

The Defendants to the plaint were fifty-nine in number, and the five Respondents were the first-named five Defendants; the rest of the Defendants were severally holders of mortgages, and other derivative and subordinate interests in the different shares taken by the parceners under the division made in 1834.

The facts were these:—

The common ancestor of the Appellant, the third Respondent's husband, and of the fourth and fifth Respondents, was one *Sitaramien*, who died, leaving six sons. These sons formed an undivided family, consisting of six branches, who, after the death of *Sitaramien*, held and enjoyed the family property in common.

In the year 1806, the family being then undivided and the first, second, and third sons of *Sitaramien*, the common ancestor, being dead, their three sons, together with the three surviving sons of *Sitaramien*, came to a di-

vision of the family property, upon which the Appellant relied as the foundation of his claim. This transaction was held by the several Courts of *Sudder Ameen, the Zillah,* and the *Sudder Dewanny,* to have been a mere temporary arrangement, and not intended to be permanent, and its purpose being served, a reunion of the family ensued, after which the parceners continued to hold the property as an undivided family until the year 1830.

On the 30th of *September,* 1830, a *Kararnamah* (agreement) was entered into by the then surviving members of the family, for a prospective division of the family villages at some future period, as might be agreed on, with joint cultivation and engagement thereof in the six equal shares in the meanwhile. Nothing, however, was done to carry out this intended division. At the date of this agreement, the Appellant was a minor, and a party, to it by his Mother, as his guardian.

On the 22nd of *March,* 1834, a further deed of division was executed between the parties to the deed of 1830, which the Appellant, being then of age, executed. By this partition the property was divided into six equal shares, which were separately allotted to the Appellant, and the first, second, and third Respondents, and the fathers of the fourth and fifth Respondents.

On the 19th of *November,* 1855, the Appellant filed his plaint in the Court of the Principal *Sudder Ameen* of *Tinnevelly,* against the Respondents and others not parties to the appeal, stating the transaction of 1806, and alleging that in *March,* 1834, the Appellant and the second Respondent, *Venkatarama Ayan,* since deceased, were minors, and that during their alleged minorities *Sitaramien,* who had been adopted by the Appellant's elder brother, was, while a minor of only five years, adopted without authority, by that brother's widow, *Ananta Ammal,* the third Respondent, during pollution after her husband's death. And that in *March,* 1834, during the minorities of the Appellant and the second Respondent, *Sitaramien,* through his mother, joined in the partition, and re-distributed the family property into six shares contrary to law, and exchanged deeds of partition, but that such deeds were not put in force. The plaint then alleged circumstances to show that certain other adoptions made by some of the family were illegal and invalid; but which fact from the course the suits took, both in the Courts below and before the Judicial Committee, it is not necessary to specify; and then went on to allege, that the Appellant was the *Dwamushyayana* or heir, both to his

adoptive father and his natural father, and was entitled, as such, to a moiety of the property in question, which he thereby claimed, the other moiety falling to the first and second Respondents ; and prayed for a decree for an account of his moiety of the property described in the plaint, authorizing him to enjoy his share according to the local usages.

The effect of the case made by the plaint was, that by the disqualification of *Sitaramien* and the fourth and fifth Defendants, three of the parties to the partition of 1834, through the alleged illegality of their several adoptions, to reduce the family from six to three members, and, having regard to the Appellant's double capacity of heir to his natural as well as to his adoptive father, the family property was reduced to four shares, of which two would belong by proprietary right to the Appellant, as such conjoint heir, and the other two to the first and second Defendants.

The Defendants, the present Respondents, filed separate answers. The first Defendant denied the validity of the second Defendant's adoption, and consequently his right to any share, and claimed a moiety of the family property for himself. The second Defendant pleaded his minority at the time of the partition of 1834, and alleged that the division of 1806 had been confirmed by the Courts.

The fourth Defendant relied on the following points :— First, that the suit was barred by the Regulations of Limitation, the cause of suit having arisen in 1834, and the suit not having been commenced within twelve years. Second, that the family was a divided one. Third, that the adoption of the fourth Defendant was valid; and fourth that the Appellant's plea of *Dwamushyayana* was unsustainable. He further stated, that the Appellant's allegation of his being a minor in the year 1834, was false ; that he attained his full age in 1832-3, and that ever since the partition of 1834 the property in question had been enjoyed by the parceners as a divided family according to the division then made, as had been admitted by the Appellant in certain proceedings and depositions before the Revenue authorities ; and that the Appellant, if dissatisfied with that division, ought to have brought his suit within twelve years. In respect of the adoption of the fourth Defendant, the answer stated, that the adoption (the fact of which was admitted in the plaint) took place in *January*, 1836, when he was five years old, and before the performance of his tonsure ; and that he

being, at the time of filing the answer in 1856, twenty-five years old, the interval since the adoption was twenty years, and exceeded twelve years, after which lapse of time an adoption was unimpeachable. The answer further stated, that the deed of division in 1806 was passed simply in order to evade the demands of Creditors, but was not effectuated ; and that, after the pressure of the Creditors had ceased, the parceners cancelled the deed of 1806, and agreed by the deed of agreement of 1830 to hold and enjoy the property in six shares, and to live separately; that, conformably to that agreement, the parceners, by the deed of the 22nd of *March*, 1834, divided the property into six shares, and thenceforward held and enjoyed the same in severalty accordingly, and had ever since lived separately, and paid fiscal dues separately. That after the division of 1834 a dispute arose among the parceners in regard to the house grounds, and that an agreement was passed to the effect that they should enjoy them according to the lots cast by them of their own accord in *April*, 1834, and that in other respects the division of 1834 should be adhered to ; and he further stated that the Appellant had attested a deed of mortgage made by the fourth Defendant of his share of the property in 1840; and that from such fact, in conjunction with the allegation in the plaint, that the Appellant and the first and second Defendants had separately mortgaged certain portions of the original family property, it was evident that the Appellant was a divided member of the family. The answer also referred to Hindoo law authorities, in support of the validity of the adoptions impeached by the plaint ; and averred, with reference to the allegation of the Appellant, that he was a *Dwamushyayana*, or heir of two fathers, that the claim was untenable.

The answer of the fifth Defendant relied upon the Regulation of Limitations, and insisted upon the validity of his own adoption, as conformable to the custom of the southern countries, to adopt nephews (sisters' sons), the validity of the second Defendant's adoption, which stood on the same footing, being admitted by the Appellant. He claimed also the benefit of the fourth Defendant's answer, as a sufficient defence against the Appellant's claim.

The answer of the third Defendant relied and the agreement for partition of 1830, to which her deceased husband and the five other parceners were parties; the subsequent agreement of 1834, and upon the continuous enjoyment of the property, according to the division of 1834, down to the commencement of the Appel-

lant's suit. She relied also on admissions of her title to one-sixth, made by the Appellant, in the course of various proceedings before the Officers of Revenue. She denied the alleged adoption of *Sitaramien* when under pollution; and she averred that in *February*, 1834, when her husband, *Ramakistnien*, was laid up with illness, he, in his own proper person, made the adoption as declared by *Sastras*, and died subsequently. She denied also the legality of the claim of the Appellant to be *Dwamushyayana*, or son of two fathers, and stated that the custom of *Dwamushyayana* did not exist in the District where the family property lay, and that the Appellant could not on such ground lay claim to a moiety of the estate. This Defendant claimed also the benefit of the answer of the fourth Defendant.

The cause was heard by the Principal *Sudder Ameen* of *Tinnevelly* (*T. Sundara Charlu*), and on the 14th of *September*, 1857, the plaint was dismissed. The *Sudder Ameen* was of opinion, that whatever might have been the nature or character of the alleged division of 1806, the division of 1834 was binding on the Appellant, by whom it had been executed in *propriâ persona*, by affixing his own mark, and not by his guardian, as was the case with the agreement of 1830. It was observed by the *Sudder Ameen* that the Appellant was of the age of discretion at the time of entering into the agreement of 1834; that in the Exhibit XVII., which was a petition presented by the Plaintiff to the *Taluq* authorities, he admitted the division of the property into six shares by the agreement of 1834, and also the fact that some of the lands were afterwards enjoyed in common, and that some were divided and enjoyed in six shares; that under these circumstances the Plaintiff and the first, second, and third Defendants, and the fathers of the fourth and fifth Defendants, became divided members; that notwithstanding the statement of the Plaintiff at the hearing, that the six shares did not under the division of 1834 enjoy any portion of their respective shares, or the produce thereof, and that he the Plaintiff enjoyed a greater share, such illegal enjoyment could be of no prejudice to the shares of the lawful co-parceners, and could confer on the Plaintiff no title to a greater share to which, under the Hindoo law, he could not become entitled, for that, according to the text of the Hindoo law, a person who for ten years lived separately, and performed ceremonies separately, must be considered as divided, and that the Plaintiff had in his deposition admitted that ever since the division of 1834 the parceners had lived separately, and performed the anniversaries,

death, &c., separately. As regarded the adoptions of the fourth and fifth Defendants, to which the Appellant took exception, the Judge held that all these adoptions were valid by the Hindoo law. As to the adoption of *Sitaramien* which was impeached on the ground of its having been made by the third Defendant while under pollution after her husband's death, the *Sudder Ameen* considered it proved that this adoption was not made by the third Defendant at all, but by her husband, *Ramakistnien*, himself, shortly before his death, and he held that as *Sitaramien* was dead, the third Defendant, as the widow of *Ramakistnien*, was a parcener under the division of 1834.

The Appellant appealed to the *Zillah* Court of *Tinnevelly*. The appeal was heard before Mr. *E. Story*, the Civil Judge, and the decree of the Court below affirmed, on the 21st of *May*, 1858. The judgment of the *Zillah* Court proceeded on the ground that the Appellant was, by his own showing, seventeen years of age at the date of the division in *March*, 1834, and, not being a ward of Court, became of age when sixteen; that the division of 1834 was shown to have been acted upon by all parties, including the Appellant; that all the impeached adoptions took place more than twelve years prior to the institution of the suit, and could not, therefore, after such a lapse of time, be brought into question; that the equality or inequality of the division of 1834 was of no moment, and that, as the Appellant had not proved his own title to the shares of the third, fourth, and fifth Respondents, it mattered not whether their defence had or had not been substantiated.

From this decree the Plaintiff appealed to the *Sudder Dewanny Adawlut at Madras*.

On the 26th of *April*, 1860, that Court, consisting of Messrs. *Frere*, *Strange*, and *Beauchamp*, pronounced the Court's decree; after stating the facts of the case, the Court delivered their judgment upon the question of division in 1834, in the following terms:—" After hearing argument on either side, the Court consent to extend their investigation to the consideration of the various other points of law embraced in the case, namely, the circumstances of the family as to division, and the validity of the disputed adoptions. It is attempted on the part of the Plaintiff's Counsel to maintain his rights under the alleged division of 1806. The Court, however, view the plea as untenable. It is not in accord with the form in which the plaint has been drawn up, which puts the family forward

as virtually undivided, and calculates the shares as consisting of six equal parts. It is pleaded that the Plaintiff is not bound by the arrangement of 1834, on the ground that he was then a minor. This plea has been negatived in the Lower Courts, it having been found by the Exhibit XIX., that the Plaintiff had accounted himself twenty-nine years of age in 1846, which would show him to have been more than sixteen years old, or in his majority, in 1834. The Court observe also that in the years 1845, 1846, and 1847, the Plaintiff has spoken of the division of 1834 as a transaction in which he had been concerned, and has stated that it had in part been carried out, as appearing by the Defendants' Exhibits XVII., and XIX., and Plaintiff's Exhibit Z, so that the Plaintiff is precluded now from disputing the fact or questioning his liabilities under it. At the hearing of this appeal the objection taken to the adoption of *Sitaramien* has been withdrawn, and it is found that on previous occasions, namely, in the aforesaid Exhibits XVII. and Z, the Plaintiff has recognised this adoption. The fact of the family being in a divided state further-more vests this share in the third Defendant, whatever may be said of the adoption of *Sitaramien*, who has demised. The adoption of the fourth and fifth Defendants occurred in the years 1837 and 1842 respectively. In the Exhibit Z, dated in 1847, the Plaintiff has mentioned that illegal adoptions had been made in the family, but without specification of such adoptions. It appears, however, that on a previous occasion, namely, in 1846, the Plaintiff admitted these parties to be shareholders, as shown by Exhibit XIX., without in any way objecting to their position in the family; and in Exhibit XXVI., which is a family tree made use of by Plaintiff, their names appear as members of the family. The Court is of opinion, that the Plaintiff is precluded from challenging these adoptions, by his own past acquiescence therein. The second Defendant has demised; but as his share forms the subject of the appeals Nos. 191 and 192 of 1859, it is not necessary to deal therewith in the present suit. The Court so far amend the decrees below as to award to the plaintiff a sixth share in the villages mentioned in the Exhibit XLII. as still undivided. The plaintiff's suit having been based upon a misrepresentation of his title, and it not appearing that, had he confined his demands to so much as was really his due, compliance therewith would have been refused by the Defendants, the Court resolve to charge the Plaintiff with the whole costs of the suit."

The Appellant applied to the *Sudder Dewanny Adawlut* for a review of the above judgment, but the petition was rejected by an Order, dated the 5th *September*, 1860.

From the above decree and the Order of the *Sudder* Court of *Madras*, refusing a review of judgment, the present appeal was brought.

Mr. *W. W. Mackeson*, for the Appellant :

The question of disability arising from infancy raised in the Court below is abandoned. The principal points now relied on are, first, as to the effect of the alleged deed of partition made in the year 1834. Upon this question, it is submitted, the Courts in *India* proceeded in their judgment on a false basis, namely, that there was a complete and valid division by the deed made in the year 1834. Such was not the case ; no entire division of the family property was made by metes and bounds, and the evidence shows the deed did not operate as a complete division. It has been ruled by the Courts in *India*, that the mere fact of the registry of an estate in separate portions is not conclusive of the fact of division. A partial and incomplete division is no division at all. *Strange's* Hindu Law, Vol. I. pp. 195, 209 [2nd Ed.]. *Strange's* Hindu Law, Vol. II., p. 387. 1 *W. H. MacNaghten's* Princ. of Hindu Law, p. 53. *Doe dem. Remmaut Seat* v. *Bulram Chunder* (*a*) *Prawnkissen Mitter* v. *Sreemutty Ramsoondry Dossee* (*b*). The mere execution of a deed of division, therefore, if not acted upon cannot alter the condition of an undivided family. The Hindu law recognises no arrangement as constituting a divided *status*, nothing short of entering upon the enjoyment of the respective shares, and that under a valid division. Here the deed of 1834 of the intended division, having been only partially acted upon, is void. Moreover, the intended division was unequal, which also invalidates the partition.

Secondly, with regard to the alleged adoption of the fourth and fifth Respondents. It is submitted that there is no evidence to support that fact, but if so, they were invalid in law. There can be no adoption of a sister's son. *Strange's* " Manual of Hindu Law," p. 22, pars. 84 and 86. [2nd Ed.] " Prince. of Hindu and Mohammedan Law," p. 70, by *W. MacNaghten* [Ed. by *H. H. Wilson*]. *Sutherland.* On Adoption, p. 35. *Strange's* Hindu Law, Vol. I. pp. 83, 84. [2nd Ed.] *Ramalinga Pillai* v. *Sadasiva Pillai* (*c*). *Narasammdl* v. *Balarámáchárlu* (*d*). The adopted

(*a*) Morton's Rep. 80.
(*b*) 1 Fulton's Rep., 110, and see authorities collected on this point, 6 Moore's Ind. App. Cases., 546.
(*c*) 9 Moore's Ind. App. Cases, 506.
(*d*) 1 Stoke's Mad. H. C. Reps., 429.

must be one who might have been issue of the adopter, as the child of one whom the adopter might have married. *Strange's* Hindu Law, Vol. I., p. 83. The objection as to tonsure having taken place before adoption is now also abandoned. As a general rule, tonsure places a son inextricably in his family, but investiture prevents adoption. *Strange's* "Manual of Hindu Law, p. 26. *Sutherland* On Adoption, p. 124. *Strange's* Hindu Law, Vol. I., P. 89.

Again, the decree is wrong, as the Appellant is entitled as *Dwyamushyayana* or son of two fathers, to seven-twelfths instead of one-sixth, as decreed by the *Sudder* Court. As a general rule, the adopted son cannot be heir in his natural family, but only to his adopted father; but it is otherwise where the natural and adoptive fathers agree that the adopted shall retain his natural rights, or belong to both fathers. If a man having two sons gives away one, and his other son die, and their issue fail, the adopted son may resume his natural rights. *Sutherland* On Adoption, pp. 127, 187.

Mr. *Prendergast,* for the third, fourth, and fifth Respondents :

The family of the parties to the suit was a divided family. The right to impugn the validity of the partition deed of 1834, if any error existed, which is denied, was barred by lapse of time under the law of limitation, as well as by the acquiescence of the parties before the commencement of the suit. The partition made in 1834 was made with the personal concurrence of the Appellant, who, it is acknowledged, at that time was under no legal disability. He is, moreover, as appears from the evidence, estopped, by his own acts and declarations subsequent to the partition, from impugning its validity. With regard to the adoptions which the Appellant impugns, the evidence in the cause is sufficient to establish their validity; but if the Appellant had any right to question their validity, such right is barred by the lapse of time before the commencement of the suit. The decree, therefore, of the *Sudder Dewanny Adawlut* was in all respects just and proper, and ought to be affirmed, and this appeal dismissed with costs.

The Right Hon. Lord WESTBURY :

This is an appeal brought from a decree of the *Sudder* Court at *Madras,* which affirmed the decree of the *Zillah* Court of *Tinnevelly,* which itself affirmed the ori-

ginal decree of the *Sudder Ameen* of that District. It is, therefore, an appeal from three decrees, unanimous in rejecting the claim of the Appellant.

The present appeal is founded upon an allegation that certain property (shares in which are claimed by the Appellant) continues the undivided property of the family of which the Appellant was a member, and which was originally an undivided family. The foundation of the defence to the Appellant's claim is an instrument, which we will call, for the present purpose, a deed of division, dated the 22nd of *March*, 1834.

Certain principles, or alleged rules of law, have been strongly contended for by the Appellant. One of them is, that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds.

Their Lordships do not find that any such doctrine has been established; and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject, to which the title is applied.

According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and Claim to take from the Collecter or receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

With reference to the cases in the *Madras* High Court which have been relied upon by the Appellant, we believe, upon an examination of them, that there is not to be found in any one, clearly and affirmatively, the doctrine contended for with reference to an agreement for the conversion of joint ownership into separate ownership, namely, that such agreement is of no effect to convert an undivided family into a divided family without an actual partition.

In the last case cited and relied upon by the Appellant, decided in the month of *February*, 1865, in the High Court at *Madras*, that Court refuses to assent to the doctrine that nothing short of an absolute partition by metes and bounds in the life-time of the different members will make the shares of the property divided.

Undoubtedly their Lordships would be unwilling to reverse any rule regarding property which had been long and consistently acted upon in the Courts of the Presidency, but it is impossible for them here to come to the conclusion that the doctrine connected for by the Appellant is to be considered a rule, which has been so accepted or acted upon by those Courts. Upon an examination of the cases, it will be found that in some the deed of partition was not attended by any subsequent act, and had been repudiated by subsequent conduct of the parties; and in another of the cases cited, where there had been a decree of partition, it seems that the decree of partition had been abandoned.

If, then, the rules derivable from the true theory of an undivided family are such as we have described, and are not at variance with any settled course of legal decision,—let us apply those rules to the deed upon which this case in reality depends.

The Appellant admits that the deed was operative with regard to ascertain number of villages, because, he says, those were actually divided; but he contended it was not a deed which made the family a divided family with regard to the rest of the villages, because it has not been followed by actual partition.

It is necessary to bear in mind the two-fold application of the word "division." There may be a division of right, and there may be a division of property; and thus, after the execution of this instrument, there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up

by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition.

The deed, after dealing with villages that were intended at once to be the subject of an actual partition, proceeds thus :—"But inasmuch as it is not intended to divide now"—What is the meaning of the words, "divide now?" Clearly, to make the same partition of the villages that follow as had previously been directed to be made of the villages which precede. "But inasmuch as it is not convenient to divide now our moiety of the villages" (then follows an enumeration of the villages), "we shall divide every year in six shares the produce of them, and enjoy it, after deducting the *Cirkar kist* and charges on the villages." Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the *Status* of the family *quoad* this property. The produce is no longer to be brought to the common chest, as representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family, who are thenceforth to become entitled to those definite shares. Thus—using the language of the English law merely by way of illustration—the joint tenancy is served, and converted into a tenancy in common.

Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right.

The words with which this instrument of the 22nd of *March*, 1834, concludes, manifest an intention to become divided, for, after expressing that they have already divided the silver and brass utensils, the parties use these words :—"We have henceforward no interest in each other's effects and debts except friendship between us." We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition.

We have examined the whole of these papers with great anxiety and care ; we have been very much assisted by the arguments at the Bar ; and by the able manner

in which the cases on both sides have been prepared. We have no doubt of the true principle which is applicable to the matter, or of the legal effect of this deed of *March*, 1834. It operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz., that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter.

Upon all these grounds we concur with the decisions of the Courts below, and we think it right to advise Her Majesty to dismiss this appeal, and to dismiss it with costs.

As the Appellant admitted, with great propriety, that, provided the conclusion of their Lordships was that the property was divided, then the shares which he now claims have followed a course of descent with which he has no right whatever to interfere,—we say nothing upon the question of adoption. Her Majesty's Order will merely confirm the decree of the Court below.

Much relating to the subject of Division has necessarily been discussed in the last preceding note on the *Status* of an undivided family, to which the reader is referred. The importance of this topic can scarcely be over-rated, in consequence of its almost inseparable connection with the law of inheritance or succession. "So intimate," writes Sir. T. *Strange*. Vol. I. p. 143. "by the Hindu law is the connexion between the two subjects of *partition* in the life of the father, and *inheritance* upon his death, that they may be said almost to blend; since, not only upon his demise, but upon his renunciation of wordly concerns, with a view to the ending his days in devotion,(a) or, after such an absence from his family as may justify the inference that, if not in fact dead, he has abdicated his temporal rights, the latter, in effect, by anticipation, as it were, attaches; as it does on his degradation for crime, unexpiated;(b)—the material difference between them, as concerns the objects, being, that, on partition taking place, the father has a discretion with regard to property acquired by him, in contradistinction to what had descended, to divide it among his sons

(a) Nareda, II. Dig. B. V. Ch. II. V. 98.
Dayabhaga. Ch. I. 31, 32, and 33,
Mit. Ch. I. S. II. 7.
Smriti Chandrika. Ch. I. 35.
Madhavya. 7.
Dayacrama. Sangraha. Ch. VI. 8.

(b) Dayabhaga Ch I. 30, 31, 32, 33 and 41.
Sancha and Lechita. II. Dig. B. V. Ch. V. S. I. V. 318.
Nareda. II. Dig. B. V. Ch. I S. 1. V. 6.

in such shares as they may respectively merit, or as circumstances may dictate,(a) exercising it always, not arbitrarily, or capriciously :(b) whereas, whatever be the nature of that of which he dies possessed, he has, according to the doctrine of the Mitacshara, no power to regulate the succession, which the law, upon his death, vests equally in all."(c)

Hence it will be necesssary to consult the notes on "*Succession*" (post) in order to obtain a clear comprehensive insight into the subject of Division.

What constitutes division.— The doctrine in the Leading Case, that actual possession of the property divided is not necessary to constitute a division, is now firmly established.(d) Mr. Justice *Strange* in his *Manual* lays down a string of propositions disaffirming this doctrine S. 282. 284. 285. In this the author was supported by many decrees of the Madras *Sudder Adawlut*. Thus, it was held that the execution of deeds of division, without actual entry on the respective shares, will not constitute a divided family. *Tippasoor Vencatacondulrow* v. *T. Jugganadarow*, and *T. Jaghanadarow* v. *T. Ventatacondulrow*. Mad. S. R. A. 6 and 8 of 1838. See *Nagapa Nynaur* v. *Meedundee Swara Nynaur*. Sp. A. No. 10 of 1852. Mad. S. R. for 1853. p. 125. *Ramasawmy Reddy* v. *Vencatamah*. Mad. S. R. for 1858. p. 55. *Veera Gounden* v. *Dutta Gounden*. ib. for 1857. p. 92. *Luchmana Baligay* v. *Atchama*. *Munjoonadhay Baligay* v. *Atchama*, and *Atchama* v. *Munjoonadhay Baligay*. ib. for 1859 : p. 50. *Sooba Naiken* v. *Taugaparoomal Pillay*. ib. p. 11. *Kuppamal* v. *Punchanauda Iyen*. ib. 260. *Radakishen* v. *Sreekishen*. 9. N. W. Pr. R. p. 357. *Yetiraj Ammah* v. *Tayamal*. Sp. A. No. 58 of 1854. Mad. S. A. for 1854. p. 184. *Nellore Narasah Reddy* v. *N. Lakshmakka*. Mad. S. A. Court. R. A. 86. of 1854. M. S. R. for 1855. p. 30. *Rungamah* v. *Achama*. 1. Mad. Sel. D. p. 521. So it has been held that a party suing for division, and dying while the suit is pending, is still undivided. *Nellore Narasah Reddy* v. *N. Lakshmakka*. 86 of 1854 *supra*. *Rungamah* v. *Achama, supra*. *Velayuda Gaundan* v. *Kuppanan*. Sp. A. 148 of 1859. Mad. S. R. for 1859. p. 263, and the same, where there was a decree, but the decree not executed. *Praunkissen Mitter* v. *Sreemutty Ramsoondry Dossee*. 1. Fult. 110. Sp. A. 66 of 1855, *Govinda Oodian* v. *Alamaloo* Mad. S. R. for 1855. p. 157.

These propositions came to be questioned in *Timmi Reddy* v. *Achama*. 2. Mad. H. Ct. R. p. 325. where the Court said, "we are expressing no opinion as to the effect of a contract made with the husband in his life-time, for

(a) Dayabhaga. Ch. II. 15, 16 and 17.
Mit. Ch. I. S. II. 2 to 6.
Dayacrama Sangraha. Ch. VI. 2, 7, 8, 12 and 13.
Madhavya. 7.
Nareda. II. Dig. B. V. Ch. I. S. II. V. 24.
Vishnu. Do do V. 25.
Yajnyawalkya. Do. do V. 26.
Menu. Do. do V. 29.

(b) Catyayana. II. Dig. B. V. Ch. I. S. II. V. 27.
Nareda, II. Dig. B. V. Ch. I. S. 11 V. 28.
Dayabhaga. Ch. II. 74, 83, 84 and 85.
Mit. Ch. I. S. II. 14.
Dayacrama Sangraha. Ch. VI. 11 and 14.
Smriti Chandrika. Ch. II. S. I. 24.

(c) Vide (a).

(d) Yajnyawalkya. II. Dig. B. V. Ch. VI. V. 385.
Dayabhaga. Ch. XIV. 1, 2, Ch. I. 8 and 9.
Mit. Ch. II. S. XII. 1, 2. Ch. I. S. I. 4.
Smriti Chandrika. Ch. XVI. 1, 3, 11.
Madhavya. 55.

there is no evidence here of such a contract. Still less are we expressing our assent to the doctrine that nothing short of an absolute partition by metes and bounds in the life-time of the deceased member will make his share the property of a divided member."

This case was followed by the Leading Case, in which the Privy Council refer to this decision. But before the Privy Council Decree, the Madras High Court had again occasion to consider the subject in *Rajah Suraneny Lakshmy Venkama Row* v. *R. S. V. G. Narasima Row*. 3. Mad. H. Ct. R. p. 40. (affirmed by Privy Council. See 12. Suth. P. C. p. 40. s. c. 3. Beng. L. R. p. c. p. 41). There the Court held that an agreement partially acted upon, and not denied, is conclusive evidence of the division previously come to by mutual consent; that, whether the property was actually divided or undivided property, the family was divided, the brothers became capable of contracting and did contract, and that the right to sue upon the contract clearly survived to the defendant, who must have recovered; that she had, therefore, a perfectly valid defence to the present action, in which the Defendant contended that there was a complete division under an agreement between her husband and his brother, after which her husband left the property to her by will. In that case the Court said,

"In *Rewan Persad* v. *Mussamat Radha Beebee* (IV. Moore's I. Ap. 137), a case from a province governed by the Benares rule of law, the Judicial Committee, confirming a decision of the Sudr Court of Agra, held the widow of a deceased divided brother entitled to take a share of an estate to which he and his brother, the resisting defendant, were entitled in remainder, although the husband had died in the life-time of the tenant for life. This, therefore, is a distinct decision that partition may be effected without any physical possession of the property parted. That was a share still to be ascertained, precisely as is that in the present case; it was a vested interest in an undivided half-share which the Courts decreed: several passages of the Judgment also strongly conflict with the supposed principle that has been applied in the present case. If the Judgment is supposed to go upon the distinction that delivery in this case was not possible, that principle is equally applicable to the present case. If weight, too, as in some decisions of the late Sudr Court, was given to the fact that there had been partial division, that circumstance is also to be found in the present case, for the Judge has found separate residence; and, as the deed of division shows, that separate residence was procured by a division of a portion, at all events, of the real property.

"In Bengal it seems to have been the opinion of the Court that a division as to food and business was sufficient to entitle a widow to succeed to her husband's share, although the real property had not been divided, (Mit. 479). A case in the Supreme Court (p. 480) seems to have decided that a decree for partition not actually executed, did not render the property divided.

"We now advert to the case of

Bhovánicharn Bunhoojea v. *The Heirs of Ramkant Bunhojea* Beng. (Sud. Dew. II. 202)., from which, as far as we can trace it, the whole of this doctrine as to the necessity of absolute delivery of shares to render a family divided, has been derived. What the case really decided was, that an unequal partition, not carried into effect, was invalid, and that the heirs were entitled to their shares under Hindoo Law. Sir F. MacNaghten, in *The Considerations*, (p. 283), examines the case with reference to the power of a father to dispose unequally of his property.

"The decision is very carefully considered by that great Sanskrit scholar, Professor Wilson, who shews (Works, Vol. V. P. 76) that the deed was invalid as being a disposition of the ancestral estate altogether beyond the power of the father, and at page 88 of the same volume, he examines the discordant opinions of the Pundits as to the necessity of actual possession."

Professor *Wilson's* opinion is then given at considerable length. It is well worthy of attentive perusal.

In *Narrayan Ayyar* v. *Lakshmi Ammal*. 3. Mad. H. Ct. R. p. 289, following the Leading Case, it was held, that, when the members of an undivided family agree among themselves, with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, each member has thenceforth a definite and certain share in the estate which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually divided.(a)

In *Mt. Jusoda Koonwar* v. *Gourie Byjonath Sohae Sing.* 6. Suth. c. r. p. 139. s. c. 2. Wym. c. r. p. 155. where the matter was thoroughly deliberated, the Court, held that under the *Mitakshara* law, there may be a partition of the estate without any actual division of the land into parcels, and allotment of those parcels to the different sharers, to be held by them in severalty.(b) There the Court say,

"For Gourie Byjonath, it is broadly pleaded that, by the Mitakshara Law (which is the law applicable to this case), there is no partition in law save when there has been an actual division by metes and bounds, or an allotting of one parcel to be held by the one party alone, and of another parcel to be held by the other party alone. It is contended that no arrangement, however, strictly carried out, by which the parties agree to be separate in all respects, and each to be separately possessed of an eight annas or any other share in an estate, absolutely freed from any interest or control of the other party,—that no such arrangement can amount to a partition in the absence of the separate allotment of properties in severalty. And certain decisions of the late Sudder Courts at Madras and Agra are referred to which do bear out this

(a) Mit. Ch. I. S. I. 4.
Subhodini and Balambhutta. Stoke's H. L. 365.
Dayabhaga. Ch. I. 8 and 9.

(b) Vide (a).
Mit. Ch. II. S. XII. 1 and 2.
Yajnyawalkya. II. Dig, B. V. Ch. VI. V. 885.
Vyavahara Mayuka. Ch. IV. S. III. 1 & 2.
Smriti Chandrika Ch. XVI. 1 and 3.
Madhavya. 55.

position. It is said in the judgment in one of these cases, that the rule thus laid down is safe and clear. There is no doubt that it is clear and simple; and if it be in accordance with the Mitakshara Law, which it is our duty to administer, there is no doubt also that it is safe; while its adoption would enable us to dispose of the present case at once without entering upon any detailed considerations of the merits, and so to avoid the host of difficulties which, in the absence of such a rule, beset the path of those who have to say whether or not there has been a legal partition. Fully alive, however, as we are to the importance and convenience of having any such simple rule, and to the daily practical difficulties which arise from the want of such a rule, it appears to us that the decisions in question are not in accordance with those of this Court or of the late Sudder Court, and that they are not in accordance with the Mitakshara Law as it prevails in those Provinces which are subject to the jurisdiction of this Court. We have not come to this conclusion without much deliberation, and we proceed to review in detail the authorities bearing on the subject, as we deem it necessary to show the grounds on which we refuse to adopt the rule of the Madras and Agra Courts."

The following Native texts are then reviewed. *Mitakshara* Ch. 11. Sec. XII. *Vyava. Mayuka.* C. IV. S. 3. (*Stoke's* Law Books. p. 47) (C. IV. S. 7. *Stoke's* p. 80.) See 34. *Vivada Chintamoni.* p. 310. *Jagganada's Digest.* B. V. Ch. VI. Sec. 2. act 2. *Daybhaga.* C. I. S. 8-10. Ch. XIV. and the conclusion come to, that though possession is a *criterion* it is not the only criterion, of division. Cf. 1. Str. H. L. p. p. 225. 9. ib. Vol. II. p. p. 387. 395. 397. 1. Macn. p. 53. ib. Vol. 2. p. 168. Case. 22.

The Court then deals with the course of decision "Such being the law as it appears in the text-books," it says, "we shall proceed to enquire how the subject has been treated in the Courts of Lower Bengal.

"In the Reports of the Decisions of the late Sudder Court in 1859 (p. 858), we find a case in which the matter was discussed. In giving judgment, the Court make the following observations:—'It 'has never been held necessary 'in this Court that a separation 'of brothers in countries governed 'by the Mithila Law should be 'proved by a deed of partition. 'Generally speaking, the separa-'tion is gradual, and it is rarely 'that it constitutes a simple act 'such as might be fitly recorded 'in a deed. The rule upon which 'the Court seems always to have 'acted is that laid down in the '12th Section of the Mitakshara 'which treats of the evidence of 'a partition. 'If,' says Nareda, 'a '' question arises among co-heirs '' in regard to the fact of parti-'' tion, it must be ascertained by '' the evidence of kinsmen, by '' the record of the distribution, '' or by separate transaction of '' affairs.' 'The last of these tests 'alone, when satisfactorily esta-'blished, has generally been 'considered sufficient evidence of 'separation; but in the present 'case, we have the first and the 'last combined, and we find that 'Bohla Dutt persevered for years

'in his endeavours to secure the 'second.'

"In this case, no actual allotment of separate parcels to the different sharers had been effected, and one of the strong points in the case relied on by the Court in deciding that there had been a separation, was that Bhola Dutt (who, it was pleaded, had separated) had, in his own name, given to the proprietors of an indigo factory, a lease of his own share of certain portions of the family property, which portions had not been allotted to him in severalty. In deciding as it did, the Court merely followed the course which had been taken by the Sudder Court in dealing with earlier cases. In no instance do we find it laid down that, according to the Mitakshara Law, an actual division and allotment of parcels to be held by each parcener in severalty was necessary. (*See* Sudder Dewanny Adawlut Reports, 1853, p. 618; Select Reports, II, 320; V, 351; VI, 273; VII, 87). It is, however, to be remarked that, from the imperfect nature of the reports of these cases, it is, in more than one of them, impossible to say whether any allotment in severalty had been made in fact or not.

"And so also in the High Court. Thus, in a case at page 18 of Sutherland's Full Bench Rulings, where the issue was whether a partition, according to the Mitakshara Law, had taken place, no question was raised as to the necessity of proof of an actual taking of the respective shares to be enjoyed in severalty. Again, in *Belas Koer vs. Bhowanee Buksh* (Marshall, 641) which is relied on by both the parties now before us, the Court remarks, after stating many circumstances which led to show that no partition had taken place, and a few which might have led to the conclusion that it had: 'Nor will 'such transactions as those 'shown us be sufficient proof of 'separation, nor, in our opinion, 'can proof of separate transactions, unless it is very amply 'shown that the transactions had 'no reference to joint interests, 'preponderate against the facts 'and probabilities arising from 'the absence of the best evidence, '*viz.*, that of recorded and recognised separation. But especially in this case, those 'separate transactions are, as 'above shown, very far from 'being of that complete nature 'that they can be accepted as 'proof of the alleged real partition.' In these observations, we see no indication of any opinion that actual separation and allotment of parcels is requisite. The Court goes no further than to say that, in the absence of recorded and recognised separation, there must be full and clear proof of separation,—which there is no doubt is always necessary.

"Then there is the case of *Badamoo Koer versus Wazeer Sing* (5 Weekly Reporter 78), a special appeal in which there was a difference of opinion between the Judges. We need here only give the following passage from the judgment of Mr. Justice Louis Jackson, there being no near approach, in any of the judgments delivered, to an expression of opinion, that actual allotment of lands in severalty is essential: 'It appears to me that the Lower

'Court found as a mater of fact 'that the family was not separate 'in estate, and that the special 'appellant, by the form of his con- 'tention in the Lower Appellate 'Court, virtually admitted this to 'be so. I think that, unless there 'has been a definitive separation 'in estate indicated by separate 'enjoyment and distinct liabili- 'ties, the family must be held 'joint, and it will not establish a 'separation in estate to show that 'the different members of the 'family dealt separately with 'their shares of the proceeds, or 'even that they collected rents 'or profits from different parts of 'the estate, for that might simply 'result from some arrangement 'made for the general convenience 'of the family, and could not in- 'dicate any cessation of the joint 'rights or responsibilities.' Here also we fail to find it laid down that there can be no partition save by actual making over separate parcels to each sharer. Nor is any such opinion to be found in the judgment of another Division Court, in a case in the course of which the question of whether there had or had not been a partition was much discussed,—the case of *Ramkissen Sing versus Rajah Sahib Nundun Sing* (June 10th 1865, Regular Appeal No. 167 of 1865.)

"Another decision which has been referred to in argument by the Counsel for the respondent, is one passed on the 30th April 1864 in the Special Appeal No. 1715 of 1863. The Court there remarks: 'When no formal par- 'tition of the family estate has 'taken place, the family must be 'considered joint and undivided, 'and the succession descends ac- 'cordingly, and this notwith- 'standing a separation in food 'and residence.' The use of the word "formal" in this judgment is relied on for the respondent as showing that the Court contemplated an actual division an allotment of the estate in severalty. But when the whole judgment is read, it is clear that the word "formal" is used only in the sense of *distinct or definitive*. The main question in that case was whether evidence of separation in food and residence was sufficient to establish separation in estate also; and what the court decided is practically no more than this, that separation in food and residence is insufficient, in the absence of clear proof of separation in estate also.

"In the case of *Bulakee Lall versus Mussamut Indurputtee Kowur* (3 Weekly Reporter, 41) we find it laid down that 'any act or de- 'claration showing an unequivocal 'intention on the part of any share- 'holder to hold and enjoy his 'own share separately, and to re- 'nounce all rights upon the shares 'of his co-parceners, constitutes 'a complete severance or parti- 'tion.' The judgment of the Privy Council in the case of *Rewun Persad versus Mussamut Rahda Beeby* (4 Moore, 137) seems to us to bear out the same principle; for their Lordships appear to have been of opinion that a document in the nature of a will operated as a partition of the property given by it.

"The cases specially relied on by the respondent are *Shunkur Lall versus Mussamut Rohmer Koonwur* (N. W. P. Rep. for 1865, p. 379), and *Nagappa Nynaur versus Meedundee Swara Nynaur* (Mad-

ras Sudder Court Reports for 1853, p. 125).

"In the former case, four Judges are unanimous in holding that, in order to constitute a partition in law, particular portions of the aggregate area of land must have been divided off and assigned sparately to the sharers. The Court express the opinion that in, so deciding, they in no way act inconsistently with, or in opposition to, the principles on which the judgment of the Privy Council in Rewun Persad's case is based, or to any thing laid down there by their Lordship,—an opinion in which we do not concur, as will appear from what we have already said as to that case. The Court also refer with approbation to two previous decisions of the Agra Court to the same effect,—*Radakissen versus Sreekissen* (9 N. W. P., Rep., 357, June 30th 1854), and *Jokhoo Ram Pandy versus Muttra Persad Pandy* (12 N. W. P. March 25th 1857), We shall only observe, as to the latter of these two cases, that the decision was that of only the majority of the Court which consisted of three Judges, and that it is in direct opposition to the opinion given by the Hindoo Law Officer of the Court whom the Court consulted, and with whom the dissenting Judge concurred.

"In the case of *Nagappa Nynaur* in the Madras Court, nothing was decided save that the mere execution of a deed to effect a division of family property does not suffice to constitute a division, which can only be held to have taken place when the members of the family have actually divided their property, each taking possession of his alloted share.

"But whatever may have been the decisions of other Courts, we are clearly of opinion that there is nothing in the text-books which are usually deemed authorities on the subject of Hindoo Law, or in the decisions of this Court, or of the late Sudder Court, which would Justify us in holding that by the Mitakshara Law, no partition can be effected save by the actual division of lands into parcels, and allotment of those parcels to the different sharers, to be held by them in severalty. We think that a legal partition is proved if it be found that the parties have separated in food and residence, that there has been a distinct separation in estate indicated by separate enjoyment and separate liabilities, and that they have dealt with their respective shares separately and in a manner inconsistent with the idea of their being still joint; if, in short, looking at all the circumstances it is clear that the parties really did intend to hold, and did in fact hold their shares respectively, each freed from any interest therein of any other sharers, and if the separate enjoyment was not merely a matter of arrangement for the private convenience of the family."

See also *acc. Kirtnaraen Das* v. *Rajkoomer Rai.* 3. Beng. S. D. R. p. 219. *Lalla Sreepersaud* v. *Mt. Akoonjoo Koonwur.* 7. Suth. c. r. p. 488. *Lalla Mohabeer Pershad* v. *Mt. Kundun Koowar.* 8. Suth. c. r. p. 116. In *Mt. Vato Koer* v. *Rowshun Sing.* 8. Suth. c. r. p. 82. s. c. 4. Wym. c. r. p. 63. *Mt. Deo Bunsee Koer* v. *Dwarknath.* 10. Suth. c. r. p. 273. it was decided that a *declaration of intention* to become divided in

estate amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. In that case there were the clearest indications of the intention; it is conceived that something more than a *mere* declaration of intention must always appear.(a) *Kulponath Dass* v. *Mewah Lall.* 8. Suth. c. r. p. 302. S. I. *Jokhoo Ram Pandy* v. *Mutha Persaud.* N. W. Pr. R. for 1855. Case 286. So in *Hurdwar Sing* v. *Luchmun Sing.* 4. N. W. Pr. R. p. 42. it was held that although there had been no division by metes and bounds, a parcener who had *an ascertained share* in the immoveable property was competent to alienate it before such division without the consent of the other parceners.(b) See acc: *Bulakee Lall* v. *Mt. Indurputtee Kowar.* 3. Suth. c. r. p. 41. So in *Debee Pershad* v. *Phool Koere.* 12. Suth. c. r. p. 510. it was held that, though actual partition by metes and bounds is not necessary to a separation between the members of a joint Hindoo family, yet there must be some unequivocal act or declaration, on the part of the family, of their intention to separate. A suit by one member for a declaration of his right was held not to be a sufficient indication of such intention.(c)

Thus in *Gopal Row Pandoorung* v. *Rama Bee* 2. Borr. 625 a memorandum of division between two brothers, one of whom had neither agreed to nor signed it, was held not to be binding.(d)

An agreement, to divide followed by acceptance of share, estops the receiver from denying the division. *Maruda Padayachi* v. *Vera Padayachi.* Mad. S. R. for 1860. p. 248.(e) In *Domun Sing* v. *Kasee Ram.* 1. Moore's I. A. p. 366. where parties had executed certain agreements declaring their mutual interest, and liabilities, and the matters in dispute were referred to arbitration, it was held that the other parties were bound to contribute to one named in the agreements, who had been forced to pay the whole of a family debt under a decree obtained against him. But this decision turned upon the construction of the agreement, not on the point that the division was incomplete. In *Judoonath Tewaree* v. *Bishonath Tewaree.* 9. Suth. c. r. p. 61. *Mitter* J. distinguished the case from the Leading Case. He said "The learned Counsel for Doolaro has contended that in the case before us, partition must be *held to have actually taken place,* and he cited a ruling of Her Majesty in Council to the effect, that division by *metes* and *bounds* is not at all necessary to constitute partition under the Mitakshara. We do not for a moment, in fact we cannot, question the correctness of this ruling. But there can be no doubt that under the Hindoo Law, two things, at least, are necessary to constitute partition. *The shares must be defined, and there must be distinct and independent enjoyment of those shares.* In the case before us, neither of these things has yet taken place."

(a) Vyavahara Mayuka. Ch. IV. S. III. 2.
(b & c) Dayabhaga. Ch. I. 8.
Mit. Ch. I. S. I. 4.
Nareda. I. Dig. B. II. Ch. IV. S. I. V. 6.
(d) Dayabhaga. Ch. I. 2 and 8.
Mit. Ch. I. S. I. 4 and 5.
(e) Menu. Ch. IX. 47.
Mit. Ch. II. S. XII. 2.
Dayabhaga. Ch. XIII. 5.
Ch. XIV. 1 and 2.

In *Shibnarain Bose* v. *Ram Nidhee Bose*. 9. Suth. p. 87. the Court held that though a partition by metes and bounds is not necessary; an agreement between the members that the ownership is to be in certain defined shares is sufficient until division, as the Leading Case shows, no individual member can predicate of the joint and undivided property, that he has a certain definite share.(a)

A division in fact is as binding as one by an agreement. *Doe dem Goolchunder Mitter* v. *Tarachurn Mitter*. 1. Fult. 132.(b)

A symbolical partition will not, it has been said, constitute division. Thus where some camphor was divided into the appointed shares and so taken possession of, it was held not to constitute division. It did not appear what the quantity of camphor was, or whether it was part of the estate.(c) *Kurusetti Bhama* v. *Kurusetti Kamyia*. Mad. S. R. for 61. p. 68.

A division need not be in writing.(d) No Hindu transaction need be evidenced by writing, though it is most desirable that it should be. See 2. Macn. p. 168, 2. Str. 323. 325. 327. 329. 331. In *Rewun Persaud* v. *Mt. Radha Beebee* 4. Moore's I. A. p. 168. the Court says, "we apprehend it to be undisputed that a division may be affected without instrument in writing;" and every day's practice shows that it is so. In *Mantena Rayaparaj v. Chekuri Venkataraj* 1. Mad. H. Ct. R. p. 100 it was held that an *exchange* of lands, followed by possession, need not be evidenced by writing. There the Court said:

"There are instances, no doubt, in which works of authority speak expressly of particular transactions being evidenced by writing. But I believe in no case can it be considered now that the Hindù law in this respect is treated as being anything more than directory. The great importance and value, however, of written instruments as evidence, make it most desirable for the true interests of the parties and the ends of justice, that they should be generally adopted; and where from the circumstances and nature of the transaction, or the dealings between the parties, or from the usages of the country, a writing was reasonably to be expected, mere oral evidence would very properly be received and acted upon with extreme caution and deliberation; as such evidence alone can unquestionably be easily made the means of falsehood and fraud."

So in *Doe d. Rajah of Seebkristo* v. *East India Company* 6. Moore's I. A. p. 267, it is laid down that by Hindu Law a verbal grant of real estate is good, if followed by possession by the grantee.(e) In *Doe Dem Gocoolchunder Mitter* v. *Tarrachurn Mitter* 1. Fult. p. 132. s. c. 1. Morley. p. 485 § 55. verbal evidence of a partition (if believed) is as conclusive as written.(f) Division may

(a) Dayabhaga. Ch. I. 8 and 9.
Ch. XIV. 1 and 2.
Mit. Ch. I. S. I. 4.
Ch. II. S. XII 1 and 2

(b & c) Dayabhaga. Ch. XIV. 1 and 2.
Mit. Ch. II. S. XII. 1 and 2.
Smriti Chandrika. Ch. XVI. 2.

(d) Dayabhaga. Ch. XIV. 1, 2 and 6.
Vide (b and c)

(e) Vyavahara Mayuka. Ch. I S. II. 2.

(f) Vyavahara Mayuka. Ch. IV. S. VII. 27 and 28.
Dayabhaga. Ch. XIV. 1, 2 and 6.
Mit. Ch. II. S. XII. 1 and 2.
Smriti Chandrika. Ch. XVI. 1, 2 and 3.

be inferred from circumstantial evidence.(a) *Doe dem Ramasawmy Moodelly* v. *Vallatah.* 2. Str. p. 211. *Ante.* p. 182. *et seq* :—

A division may take place notwithstanding the minority of some of the members,(b) and it is not necessary that there should be more than one adult; or that they should be brothers only.(c) *Mt. Deo Bunsee Kooer* v. *Dwarknath.* 10. Suth. c. r. p. 275. There *Mitter* J. said.

"It is wholly immaterial that the respondent was incompetent by his age to exercise his own discretion in the matter. That a partition can take place notwithstanding the minority of some of the co-parceners is expressly sanctioned by the Hindoo Law. Verse 9 Section 6 Chapter I of the Mitakshara provides for the allotment of a share to a co-parcener who is born after a partition effected between the other members of the family. It is true that this verse refers to the case of co-parceners, the pregnancy of whose mother is not known at the time of the partition ; but verse 12 of the same Section distinctly states that, where the pregnancy is known, the partition is only to be deferred till the time of delivery.

"It should not be supposed, however, that the existence of more than one adult member in the family is in any way necessary for the application of this rule; or that it refers to a partition between brothers only. With reference to the first objection, it is sufficient to say that the result would be precisely the same whether the number of adult co-parceners is one or more, and if two or more adult co-parceners can effect a partition between themselves and an infant co-sharer, there seems to be no reason whatever why the same rule should not apply to a family which consists of two members only—one of whom is a major and the other a minor. The utmost that can be said is that the interest of the minor must be represented by somebody before a partition can be made, but this plea is by no means available to the respondent, as I will presently show.

"The second objection is equally untenable. It is true that the verse quoted above ostensibly relates to partition between brothers, but verse 11 of the same Section extends the rule to the case of a partition between uncles and nephews. Indeed, the law of partition is one and the same, and it applies equally to all joint families, whatever might be the number of the members and whatever might be the nature of the relationship existing between them. In the very definition of partition given in Verse 5 Section 1 Chapter 1, it is distinctly stated that the word *paternal* used in the text of Nareda implies "any relation which is the cause of property," and that the word *son* also used in that text indicates *propinquity in general.* In short, there is but one chapter of the work which relates to the law of partition, and the particular cases cited therein are merely used for the purpose

(a) Vyavahara Mayuka. Ch. IV. S. VII. 27 and 28.
Dayabhaga. Ch. XIV. 8, 9, 10 and 11.
Mit. Ch. II. S. XII. 3 and 4.
Smriti Chandrika. Ch. XVI. 12, 14 & 15.

(b) Dayabhaga. Ch. III. S. I. 16 and 17.
Mit. Ch. I. S. VI. 12.

(c) Mit. Ch. I. S. I. 5.
Vyavahara Mayuka. Ch. IV. S. III.
Dayabhagha. Ch. I, 3.

of illustrating the general principles upon which that law is founded. It is clear, therefore, that the minority of the respondent was by itself no bar to the accomplishment of a partition."

What things are not divisible.—A *Raj* is indivisible. *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba*. 7. Moore's I. A. p. 476. ib. p. 537. Regalities and ancient *Zemindaries* are not the subject of division. Str. Man. § 274. *Nellore Narasa Reddy* v. *N. Lakshama* Mad. S. A. Dec. 20 of 1846.(a) By long custom the rule of primogeniture has been introduced and prevails in them.(b) *Katama Nauchiar* v. *Srimut R. M. V. R. B. G. S. P. Oodaya Taver*. 9. Moore's I. A. p. 539. where in the *Shivagunga* Zemindary was held to be in the nature of a principality and impartible. As to the rule of primogeniture in these estates by family custom or usage. See *post, Zemindar's Estate.* In *Rawut Urjun Sing* v. *Rawutt Ghunsiam Sing*. 5. Moore's I. A. p. 169. a division was refused in a Suit by the younger brother against his eldest brother for partition of the Zemindary. See also *Mootoocoomaroo Taver* v. *Caroopayee* No. 64 of 1848 Mad. S. R. for 1851 p. 9. *Beanlal Dibih* v. *Gointneth*, Beng. S. D. R. for 1805 p. 32. *Ramgunga Deo* v. *Doorgamunee Jobraj* ib. for 1809. p. ib. for 1813. p. 415. *Vengun Manic Thakoor* v. *Ramgunga Deo* ib. for 1814. p. 469. *Mootoocoomaroo Taver* v. *Caroopayee*. Mad. S. C. R. A. 64 of 1848. And see Cases, *post*, note to *Succession*.

But this rule of primogeniture, and consequent indivisibility, does not extend to *Zemindaries* or Mootahs acquired by recent purchase. *Jagganada Row* v. *Kondarow*. Mad. S. D. for 1849 p. 112.(c) See *Booloka Pondea Choca Talaver* v. *Comarasamy Talaver*. Mad. S. R. for 1858. p. 74. where the Court said,

"The defendant specially objects to the award to plaintiff of a share in the vanithums of Paroorany and Caroocoorchy, on the ground that the nature of the gift thereof to the then zemindar by the Government, shows that it is to be held, as the zemindary of Maniachy, as an ancient zemindary. The Judges, in dissenting here from the decree of the civil judge, consider the defendant's argument to be a well-founded one. These vanithums formed a portion of the ancient zemindary of Panchalancoorchy, the holder of which had rebelled, and on assumption of the zemindary by the Government were conferred upon the zemindar of Maniachy, as such, in reward of good service. The terms of the proclamation (document *E*,) issued on the occasion, would imply that the Government meant to put the zemindar of Maniachy in respect of these vanithums into the same possession as that held by the displaced zemindar of Panchalancoorchy, and there is a clause in the proclamation to which the Court can attach no meaning, but that the gift was limited to the zemindar himself and such sons and heirs as might succeed to his station of zemindar. The

(a) Menu. Ch. IX. 323. Catyayana. II. Dig. B. V. Ch. V. S. II. V. 365.

(b) Catyayana. II. Dig. B. V. Ch. V. S. II. V. 365.

(c) Vide (b).

Court therefore hold these vanithums to have been conferred on the zemindar to support his dignity as such, and thus to be indivisible, and they reject the plaintiff's claim to a share therein."

A *Jaghire* is indivisible. 2. Str. p. 262. As to *Corodies*, see 2. Str. 297.

A *Pollium* also is of the nature of a Raj, and descends to the eldest male heir. It may belong to an undivided family, but one member at a time can alone hold it, who is styled the *Pollygar*, the other members being entitled only to maintenance. It is indivisible. *Nâragunty. Lutchmeedavamah* v. *Vengamah Naidoo.* 9 Moore's I. A. p. 66.(a)

Lands held on *Ghatwally* tenure *i. e.* for defending the *Ghats*, or passes, are indivisible, and descend, on death of the holder, entire to a male heir, *Rajah Lelanund Sing Bahadoor* v. *Government of Bengal* 6. Moore's I. A. p. 101.

Enams are inalienable *Manikamal* v. *Chittumbara Dikshadar* Mad. S. R. for 1860. p. 173.

In *Pertaub Sing* v. *Tilukdharee Sing.* Beng. S. D. R. for 1805. p. 101. it was held that where the grant is exclusive, it is not partible among collaterals, though it would be among the sons of the grantee; and see Mad. S. R. for 1860 p. 173. 2. Str. 365. per *Ellis.* ib. 365-7. Villages granted for the maintenance of a family by a Zemindar are not divisible, though the annual produce is. *Visvanada Naick* v. *Bungaroo Teroomala Naick.* Mad. Sud. R. for 1851. p. 87. And in *Ramchunder Rauze* v. *sons of Pedda Mulrauze.* 1. Mad. Sel. D. p. 85. it was held that lands granted by two co-parceners to the mother of the third for maintenance were not divisible.

The *Pattam* or office of dignity in a family governed by *Aliya Sultana* Law is indivisible. *Timmappa Heggade* v. *Mahalinga Heggade.* 4. Mad. H. Ct. R. p. 28.

Lands dedicated to religious endowment, places of worship and sacrifice, are not divisible.(b) See *Elder widow of Rajah Chutter Sein* v. *Younger widow* 1. Beng. S. D. R. p. 180. *Joymonee Dabee* v. *Takur Chund Chuckerbutty* 1. Beng. S. D. R. 180. *Bhowanny Persaud Chowdry* v. *Ranee Jagadumba.* ib. 4. p. 348. *Ramchunder Roy* v. *Rajah Udwant Singh.* 5. ib. 210. See *post*, '*Succession.*' They cannot be alienated. *Mohunt Gopal Doss* v. *Mohunt Kerparam Doss. Mohunt Kalumper Kash Doss* v. *Mohunt Jagmohun Doss.* 2. Morl. n. s. p. 357 & 6. The mode of enjoyment, is by the parties in turn; unless they can agree on a joint worship.(c) Any infringement of the right to worship in turn gives a cause of action. *Anund Moyee Chowdrain* v. *Boykantnath Roy.* 8. Suth. c. r. p. 193. And see as to the enjoyment and use of an idol and property bequeathed in support of it, Macn. *F. Nubkissen Mitter* v. *Hurischunder Mitter.* p. 323. *Elder widow of Rajah Chitter Sing*

(a) Menu. IX. 323.
Catyayana. II. Dig. B. V. Ch. V. S. II. V. 365.

(b) Vyasa. II. Dig. B. V. Ch. V. S. II. V. 364.
Dayabhaga. Ch. VI. S. II. 25 and 26.
Vyavahara Mayuka. Ch. IV. S. VII. 20, 21 and 23.
Dayacrama Sangraha. Ch. IV. S. II. 21.

(c) Catyayana. II. Dig. B. V. Ch. V. S. II. V. 365.
Vyavahara Mayuka, Ch. IV. S. VII. 20, 21 and 23.

v. *Younger widow*. Beng. S. D. R. for 1807. p. 13. 1. Str. 208. 210. Str. Man. § 27. A house dedicated to '*Mohabur*' is not alienable; but where a part of it only is so dedicated, the rest may be alienated, and therefore subject to division. *Hurnarrain* v. *Govindrain*. N. W. P. R. for 1850. Case 168. But if the endowment is merely nominal, it is divisible. *Mahatab Chund* v. *Mirdad Ali*. 5. Beng. S. D. R. p. 268. See *Kissmochun Baneyee* v. *Ranunder Deb Raj*. 4. ib. p. 197.

Lands purchased by a joint-member with *borrowed* capital will not be subject to partition on a division; for they are his self-acquisition, the family funds having in no sense been instrumental in obtaining them. 2. Macn. p. 151. 152. 154. 155. 156 161.(a)

Self-acquired property is never liable to division.(b) *Calutty Pillay* v. *Yella Pillay*. 1. Mad. S. Dec. p. 148. See *Brij Rutun Das* v. *Brij Pal Das*. 1. Beng. S. D. R. p. 182. *Purtab Bahadur Singh* v. *Telukdharee Singh*. 1. Beng. S. D. R. p. 178. *Kaleepersaud Roy* v. *Digumber Roy*. 2. Beng. S. D. R. p. 237. In the absence of proof of self-acquisition, lands held by a member of an undivided family are subject to division.(c) *Bairy Cundappa Chitty* v. *Bairy Jaganada Chitty*. 1. Mad. Sel. D. p. 372. As to what constitutes self-acquisition, See *Supra* '*Undivided Family.—Self-acquisition*'; The mere fact that an estate is in its nature impartible, will not make it separate or self-acquired property in the hands of the holder. *Stree Rajah Yanumala Venkayamah* v. *Stree Rajah Y. B. Venkondorah*. P. Council. 5. Mad. Jur. p. 185.

Property acquired by the medium of *science* is not divisible, unless the science has been imparted at the family expense; and while the party was receiving family maintenance. If the science has been imparted at the expense of persons not members of the family, it is not divisible.(d) *Chalakonda Alasani* v. *Chalakonda Ratnachalum*. 2. Mad. H. Ct. p. 56. in which all the authorities were reviewed. There the Court said, "The Mitàkshará is in this, as in all other questions of Hindú law arising in these provinces, the first authority to be consulted. The language of the commentator is unusually explicit (sec. 6). "That gained by science without 'use of the family-estate is not 'the subject of partition." The objection to the interpretation is repelled by a distinct text of Nàreda. "He who maintains 'the family of a brother studying 'science, shall take, be he ever 'so ignorant, a share of the 'wealth gained by science." The same conclusion must be derived from the definition of wealth

(a) Yajnyawalkya. II. Dig. B. V. Ch. V. S. II. V. 352.
Vyasa. Do do V. 364.
Dayabhaga. Ch. VI. S. I. 1 to 7.
Mit. Ch. I. S. IV. 1 and 2.
Vyavahara Mayuka. Ch. IV. S. VII. 2.
Dayacrama Sangraha. Ch. IV. S. II. 11.
Smriti Chandrika. Ch. VII. 27, 28, and 29.
Madhavya. 47.

(b & c) Vide (a).

(d) Catyayana. II. Dig. B Ch. V. S. II. V. 347.
Menu. Do do V. 348.
Nareda. Do do V. 352 & 357.
Vyasa. Do do V. 354.
Dayabhaga. Ch. VI. S. I. 21.
Mit. Ch. I. S. IV. 7 and 8.
Vyavahara Mayuka. Ch. IV. S. VII. 1 & 2.
Smriti Chandrika. Ch. VII. 1, 2 and 6.
Madhavya. 49.

gained through science by Kàtyayana, stated by Colebrooke to be an expositor of the highest authority. That definition is "wealth gained through science which was acquired from a stranger while receiving a foreign maintenance, is termed acquisition through learning." It follows that gains of that science, imparted at the family expense and acquired while receiving a family maintenance, are not impartible property.

"It must be admitted that it is difficult to reconcile çlokas 204 and 205 with çloka 208 of Menu. Clokas 204 and 205 seem to render partible the self-acquisitions of brothers living in union after the death of their father; and according to the ancient law and that of Bengal, there seems nothing unreasonable in the provision. At that time division can be enforced, and if they elect to live together there is nothing inequitable in treating their acquisitions as joint.

"It seems to us that çloka 208 must be read in strict connexion with 207. This provides for a brother with an occupation adequate to his maintenance abandoning all claim to a share. It may well be that with superfluous caution the legislator went on to provide in 208, that the acquisitions of such a brother not being made with family funds, he need not give a share. It can scarcely be supposed that, emphatic expressions "by his own efforts" and "by their own labour" had not reference to what would naturally be self-acquisitions but for the fact of the brothers "electing to live in union after the father's death." The sense scarcely permits the hypothesis that acquisition by family funds were meant. If this is the correct solution, then çloka 206 will have precisely the meaning attached to it by the commentators, and the three together would read. "The self-acquisitions of an elder and also of younger brothers living in union after the father's death will be partible, but the acquisitions of learning and skill will not be." We do not feel at all confident that this is the correct explanation, and we are doubtful whether a perfectly satisfactory one is possible. The obscure character of these passages would in any circumstances prevent us from over-ruling by their authority the distinct statements of jurists who have expanded and explained the fragments of Menu who is much more ethical and religious than jural.

"Jimùta Váhana sums up the doctrine thus: "Since it appears from these and other texts that partition does or does not take place in the case of wealth acquired by science, valour or the like, according as joint property is or is not employed." The texts quoted justify his conclusion, which differs in no respect from that of the Mitàkshará.

"We do not think it at all necessary to examine at length the discussion of the matter in Colebrooke's Digest. The doctrine of the compiler is in according with that of the Dáyabhága and the Mitàkshará. We will only say that passages are to be found there which seem to point to a distinction between the gains of ordinary learning of

valour and the great rewards occasionally obtained by some extraordinary exhibition of either. It is unnecessary, however, to consider whether there is any solid ground for this distinction. We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science which have been thought at the expense of the family funds, are not impartible. To render them so, the science or learning must have been imparted by persons not members of the learner's family."

And see acc. *Bai Manchha* v. *Narotamdas Kashidas*. 6. Bomb. H. Ct. R. c. a. j. p. 1. following the case in the Mad. H. Ct. *supra*, and disagreeing with *Mr. Grady* p. 405. See also *Dhunookdharee Lall* v. *Gunput Lall*. 10. Suth. c. r. p. 122.

Yautaca is not divisible. 2. Macn. p. 159.(a)

In Malabar the family has no right to call for division according to the *Maramoo-katayam law*. *Anon* v. *Moo-ricolly Ramara Nambiar*. 1. Mad. Sel. D. p. 118. But it may be effected by consent. ib. p. 118. *Ravee Vurmah* v. *Cherrikul Chenga K. M. A. Valia Vurmah*. Sp. A. 4. of 1857. Mad. Sud. R. for 1857. p. 120. And see the Malabar and Canara cases collected in the Note on *Status of an undivided family*.

What things are divisible.—Where a hereditary Zemindary was shown to be managed by one for the benefit of all, it was held divisible. *Srinath Serma* v. *Rhadakaunt*. 1. Beng. S. D. p. 15. and when divided, each holder may sell his separate share. *Ramrutun Singh* v. *Chunder Narrain Rai*. 1. Beng. S. D. R. p. 1. Where an ancient Zemindary was shown to have been sometimes held by the law of primogeniture, and sometimes by the members in common, it was held divisible. *Rajah Sooranany Venkataputty Rao* v. *Rajah Sooranany Ramchendra Rao*. 1. Mad. S. D. p. 495. There the Court said,

"The Zumeendaree of Mylaverana is the oldest possession of the family; and as far as is shewn by the evidence on the record it would not appear ever to have been actually divided. But the Appellant himself shews that it has not always been held exclusively by the senior male of the family. According to his own statement, his Grandfather Vencataputty Rao in the year 1783 held it conjointly with a relation named Gopal Rao; and on his Grandfather's death it was held conjointly by his father Luchma Rao and the said Gopal Rao. The first plea on which the Appellant rests his exclusive title to the estate fails therefore altogether; for it is obvious that if an estate has not invariably devolved entire to the chief heir, but has been occasionally held by several heirs conjointly, the plea of family-usage in bar of a partition cannot be maintained. The fact that the estate has at times been held in common, and that at a recent period, is conclusive evidence of

(a) Menu. Ik. Dig. B. V. Ch. V. S. II. V, 358. Dayabhaga. Ch. VI. S. I. 33. Mit. Ch. I. S. IV. 6. Vyavahara Mayuka. Ch. IV. S. VII. 133. Smriti Chandrika. Ch. VII, 21 and 22.

ent ruling Princes and Chiefs over extensive tracts of country, those tracts,—forming their Zemindaries, came to be enjoyed as Regalities or Principalities ; and usage at length obtaining the force of law, such Zemindaries were by analogy brought within the special rule which exempted the power and property of Sovereign Princes from the general law of succession and partition. In its very inception then, the exemptions appear to have related strictly to the property constituting each ancestral Zemindary estate. It might, it is true, be argued as was done in the case of *The Secretary of State for India v. Kamachee Boyi Sashiba*, 9 *Moore's I. A*, that all property left by absolute Sovereign Princes is State-property, and consequently that the analogy requires the extension of the exemption to every kind of property belonging to the possessor of a Zemindary at his death. But such an argument would not in our judgment be valid. In the first place we entertain a strong opinion that the Hindu law does, what their lordships who decided the case just referred to considered that it probably did (*ib: page* 57), recognise a distinction between state and private property in the case of a Sovereign Prince, and that the general rule of partibility applies to the latter on his death: —that as remarked by Mr. Ellis in the case reported in 2 *Strange's Hindu law* 330, "the private 'estate of a Sovereign Prince may 'and ought to be divided like the 'property of others among his 'children." But in the next place supposing for the moment the law to be otherwise, as estates forming Zemindaries are in reality private property, the exemption from the general law must for obvious reasons be rigidly applied, and in our opinion as just expressed, it was originally made applicable only so far as the assumed analogy on which it rests extended ; that is to the property forming an ancestral Zemindary resembling a Raj ; and we think its legal operation has not been extended except to such portions of property, as may have become by grant or established usage parcel of an ancient Zemindary, or appurtenant thereto. No authority adverse to this view of the law was referred to in argument by the learned counsel for the respondent ; and we believe that none is to be found. The recent decision of the Privy Council in the *Yetiapuram Zemindary* case (not yet reported) to which he referred, if it aids at all, rather favors our view ; for while it treats the question of the chargeability of the Zemindary for maintenance as an open question, it implies the chargeability of property that might have descended to the Zemindar from his father, which it distinguishes from the Zemindary as private property. But the learned Advocate General, in support of his argument for the appellant, cited three decisions of the Madras Sudder Court, the earliest of which (given in 1816 and reported in the *Vol. of Select Sudder Decisions* 141) is directly in point. The suit was for a share of ancestral property held by the plaintiff's brother, including a Zemindary ; and the Court dismissing the claim as regarded the zemindary and its appurtenances, considered it clear

that the plaintiff was entitled to a division of the personal property left by his father. This decision has never before, we believe, been questioned in any legal proceeding; and there is no doubt that in accordance therewith the settled law has been and is generally understood to be, as stated in Mr. Strange's Manual, chap. X Sec : 277,and Mr. Grady's recent work on Hindu law, page 401, that the rule of impartibility applicable to zemindaries does not extend to the personal property of a zemindar left at his death.

"Now the property in the present case, to which the plaintiff has limited his claim in the appeal is indisputably personal property distinct from the zemindary. The exemption therefore we hold to be inapplicable to so much of it as has been obtained from the funds left by the late zemindar; and being inapplicable, the plaintiff's claim to a division of that portion is not open to objection on any other ground. Whether regarded as the separately acquired funds of the zemindar, or as it really is his acquisition derived from ancestral property owned by him solely, it is equally divisible family property as between his sons, the plaintiff and defendant. It was said in argument on behalf of the defendant that if the division of this fund were allowed, sons might call upon their father for a share of his savings as often as he made them, but that clearly they could not do. The law vests the wole proprietary right to the zemindary in the person who succeeds to it, and consequently he alone possesses the title to the rents and profits of estate—see the recent judgment of the Privy Council in the case of *Meelkisto De Burmono v. Beerchunder Thakoor and others* (not yet reported). The right of relations to maintenance out of the rents and profits, assuming such a right to exist, is simply a charge to which the complete ownership of the property is subject. It is only when the personal fund acquired from the zemindary estate becomes, by the death of the acquirer, paternal property in the hands of a successor, that any right of co-parcenership can arise—For these reasons, we are of opinion that the Government Securities and the amount in cash left by the late zemindar at his death and now held by the Court of Wards, together with the interest which has been received thereon and accumulated since his death, are property to which the general law of partition is applicable."

See 2. Str. 329. 330. per *Ellis* Str, Man. § 280. See *Maharajah Moheshur Buksh Singh* v. *Mt. Gunoon Koonwar*. 6. Suth. c. r. p. 245.

The management of lands endowed for religious purposes is divisible, though the lands themselves are not. Str. Man. § 275 : *Elder widow of Rajah Chutter Sein* v. *Younger widow*. 1. Beng. S. D. R. p. 180. But they cannot be alienated. *Ram Sunder Rai* v. *Heirs of Raja Udwant Singh*. 5. Beng. S. D. R. p. 210. nor can their produce. *Juggut Chunder Sein* v. *Kishwanund*. 2. Beng. S. D. R. p. 126. If there is any surplus after all expenses &c., are defrayed, it is divisible. *Rajoo* v. *Buddun*. 2. Beng. S. D. R. p. 13. But remember that the

profits of a religious trust are assets of the Trust. *Ramsundar Roy* v. *Heirs of Raja Udwant Singh.* 5. Beng. S. D. R. p. 210.

See however *M. D. Kumarasawmy Mudali* v. *D. Ramalinga Mudali.* Mad. S. R. for 1860. p. 261. where the Court said;

"The decrees of the lower Courts appear to the Sudder Court to be wholly unsustainable. They are unable to see how, when possession of any part of the property itself was refused to plaintiff, a voice in the management thereof could be allowed him; and above all they cannot understand how he should exercise the fractional power in the management which the said decrees contemplate. The land forms the substance of an integral endowment. If it would affect the interests of the charity to divide off a portion of the endowment, much more would it do so to admit of rival managers thereof in some fractional proportion which it would be impracticable to define or regulate. Such a judgment as that of the lower courts is one which it is apparent could not be put in force." *Sed. quære.*

Ancestral family property is undoubtedly divisible; but what comes to a father from collateral relations is not ancestral, but self-acquired. See Note on *Undivided Family* A, *ante* and see 1. Fult. p. 165.(a)

In *Nallatumby Chitty* v. *Mookoondoo Chitty.* 3. Mad. H. Ct. p. 455. s. c. 3. Mad. Jur. p. 175, it was held that property coming to a father from a remote collateral relation is his self-acquired property, and therefore not such ancestral joint family property as would be divisible compulsorily by the son against his father; in accordance with the ruling in *Nagalinga Mudali* v. *Subrimanya Mudali.* 1. Mad. H. Ct. R. p. 77. In the principal case *Bittleston*, J. said, "It seems to me, therefore, upon the grounds already stated, that there is no property of the 1st defendant, of which the plaintiff can compel partition, unless it be the one house for which there is the certificate No. 1674. And as regards that property, it therefore becomes necessary to consider, whether this case falls within the ruling of this Court in *Nagalinga Moodelly* v. *Subramoneya Moodelly* 1. H. Ct. Rep. 77. The head note of that case is in these words:—"A grandson may by Hindu law, irrespective of all circumstances, maintain a suit against his grandfather for compulsory division of ancestral family property," but the property of which partition was claimed in that suit, was property which had descended to the plaintiff's grandfather from his father, and which had been increased by the grandfather himself. The case was therefore held to be within the terms of that passage of the Mitacshara on which the decision was rested. viz. "Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." Ch. 1 sec. 5 para. 8. It is to be observed that it is

(a) Catyayana. II. Dig. B. V. Ch. VI. V. 368. Menu. IX. 208.

"the grandfather's estate" which is here spoken of; and the same or like words are used throughout this section 5, which is entitled "equal rights of father and son in property ancestral." This property, in which the father and son are declared to have equal rights, is the grandfather's estate, to which both father and son indiscriminately acquire a right by birth—and it seems to me that the passage above cited does not warrant the application of this rule to any other property, even though it might be not improperly described in a wide sense as ancestral property—such as property derived from a remote collateral ancestor. The ground on which the distinction between property acquired by the father and property inherited from the grandfather rests, is distinctly stated in para. 10. "Consequently the difference is this: although he have a right by birth in his father's and in his grandfather's property; still since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating the property.")

"This doctrine of course finds no place in the Daya Bhaga, because the acquisition of any right of property by birth is distinctly denied in that school (c. 1. para. 14.) But the discussion of the subject in that treatise shows that the right of sons to claim partition in their father's lifetime, is dependent on the doctrine of acquisition of property by birth. Thus (para. 18) Devala too, expressly denies the right of sons in their father's wealth. When the father is deceased, let the sons divide the father's wealth: for the sons have not ownership while the father is alive and free from defect. And para. 19.—"Besides, if sons had property in their father's wealth, partition would be demandable, even against his consent; and there is no proof that property is vested by birth alone; nor is birth stated in the law as means of acquisition." It is this difference of doctrine between the two schools of Hindu Law, as to the vesting of property by birth which has led to the different rules established in each, respecting the right of the sons to compel partition of the paternal estate inherited from the Grandfather; and the reason of this difference is strong to show that the rule laid down in the Mitacshara, must be limited to the property in which the right by birth exists.

"In Mr. Colebrooke's translation of Jaganatha's Digest, Book 5. C. 2. Sec.: 103; at the end of the author's commentary on a text of Cátyáyana respecting the right of a father to receive two shares out of property acquired by his son, there is a passage which tends to confirm the view I have above expressed. The author proposes the question,—"In partition made by a father, how shall property inherited by him from his maternal grandfather who left no daughter or nearer heir, be distributed? shall he take two

shares, or the like, as if it were property inherited from the paternal grandfather; or may he reserve a considerable part of it, as if it had been acquired by himself, &c." He then states (according to his usual habit) the opinions on the different sides of the question : " To this question (he says) some reply," that his own acquired wealth, in the text of Vishnu, signifies that which was gained by his own act; but what is received from the maternal grandfather being gained without any exertion on the part of the father, is not acquired by his act; he shall therefore receive two shares or the like, as suggested by the general rule." Now the text of Vishnu referred to, is to be found at sec. 25. of book 5, C, 1. of the Digest, and is in these words :—" if a father make a partition between himself and his sons, he may give or reserve at his pleasure any part of his own acquired wealth ; but over landed property left by a paternal grandfather, the father and the sons have equal dominion;" and the argument founded on that text by those who take the view above expressed on the question propounded by Jaganatha, is thus stated by him: "The term, property left by the paternal grandfather," must be explained as property inherited in right of affinity ; whether it be received from the paternal great grandfather, or from the maternal grandfather, and so forth, the father and son have equal dominion over it. Nor should it be argued, that property regularly descending from ancestors, is alone intended by the term 'estate left by the paternal grandfather,' and that any other property, whether left by a maternal grandfather, or received as a present, or the like, is regulated by the law which allows the reserve of the greatest part and so forth. There is no argument to prove, that an estate devolving from the maternal grandfather and the rest, is not considered as regularly descending from ancestors ; and legislators have not distinguished property devolving eventually, on collaterals or on descendants in the female line.

"That reply is not satisfactory ; for, when the heritage of one who leaves no kinsman devolves on a fellow-student, or on a learned priest, the father and son would have equal dominion. In the case, where son of a daughter's son does not succeed to property eventually devolving on distant heirs, by failure of the direct descent in the male line, surely that son has no dominion if his father be dead ; but if his father be living, he is not even noticed. The very same exposition is proper in respect of the heritage devolving from the father of the paternal great-grandfather, on the grandson of his grandson ; for that has not regularly descended from ancestors, but the heritage of the paternal great-grandfather, successively devolving on his son and the rest until it reach the great-grandson, has regularly descended ; in that case the rule of equal dominion vested in father and son must be argued. However, when a great grandson, whose father and grand-father are both dead, succeeds to the estate of his paternal great grandfather, he and his son have equal dominion. There is no

objection to explain 'property left by the paternal grandfather,' an estate inherited in right of birth, whereby the ancestor attains a region of bliss ; for texts show that a man reaches heaven by the birth of a son, of a son's son, and of the son of that grandson (c.. iv and xi.)

"This commentary cannot perhaps be regraded as of very high authority, but it shows at all events that a Hindu lawyer of some repute has put the same construction on the words "landed property left by a paternal grandfather" in the text of Vishnu, as I have put on the words "the grandfather's estate" in the Mitacshara. This construction limits the rule laid down in the decision of this Court above referred to, the property which passes by what Jaganatha terms "regular descent," and that does not extend beyond the great-grandson.

"In the present case, the relationship between Chinnee and the first defendant was collateral only ; the 1st defendant being the son of Chinnee's cousin ; and certainly neither the 1st defendant nor the plaintiff acquired, by birth, any right in Chinnee's property. That property during his life he might have disposed of as he pleased, and only upon his death without any such disposition, could the defendant Mookoondoo have acquired any title to it. In the case of property so acquired, I am of opinion that the son cannot claim partition from the father during his life-time and against his will."

According to the *Mitthila* law whatever is acquired by sons living joint by with their father is divisible among them all *Rani Pudmavati* v. *Baboo Doolar Singh and Dhun Singh* v. *Dowlut Singh*. 1. Morl. p. 478. § 1.

All acquired by the patrimony is divisible.(a) In *Shib Dyal Tewaree* v. *Bishonath Tewaree* and *Juddoonath Tewaree* v. *Bishonath Tewaree*. 9. Suth. c. r. p. 61. the Court said,

"But even conceding all these facts to the appellant, we do not see how he can succeed in his contention. The very authorities relied upon by him are strongly and expressly against him, Verse 29, Chapter I, Section 4 of Mr. Colebrooke's Mitackshara, page 275, says : "It 'is settled that whatever is 'acquired at the charge of the 'patrimony is subject to partition." But Verse 30 qualifies this proposition by propounding an exception, and Verse 31 explains that exception. Verse 30 says : "The author propounds 'an exception to this rule. But if 'the common stock be *improved* 'an *equal* share is ordained," and Verse 31 says : "Among unsepe-'rated brethren if the common 'stock is *improved* and *augmented* 'through agriculture, commerce 'or similar means, an *equal* 'division nevertheless takes place, 'and a double share is not allotted to the acquirer." This is no more than a case of *augmentation* at the highest. The ancestral firm was the main nucleus of this estate and every property acquired from such a nucleus falls within the rule of equal division. Verse 29 applies to a different

(a) Catyayana. II. Dig. B. V. Ch. VI. V. 368. Dayabhaga, Ch. VI. S. I. 1 to 4.

state of things. Where a co-parcener with comparatively *small detriment* to the joint estate, *acquires* any *separate* property by his own labour or capital, the property is nevertheless to be considered as joint, although the acquirer *gets* a double share. Here, strictly speaking, there is no proof of Shibdyal having supplied any portion of the money required for the purchase of the properties in question from his own funds, and as to labour his case does not stand higher than that of a manager of a joint undivided family. In our opinion it is not even a case of *agumentation*. The mere conversion of joint funds into land is not an acquisition within the meaning of the Hindoo Law. The labour of a manager is not a means for acquiring *separate* property. It was labour voluntarily undergone for the benefit of the joint family. We hold, therefore, that the case before us neither falls within the rule laid down in Verse 29, nor within the exception in Verse 30, and must, therefore, be treated as an ordinary case of joint property."

A purchase by a joint-member drawing income from family is divisible ;(a) *Rajah. Baidyanand Singh* v. *Rudranund Singh*. 5. Beng. S. D. R. p. 198. *Sheopersaud Singh* v. *Kulunder Singh*. 1. Beng. S. D. R. p. 76. *Koshul Chukurwutty* v. *Radhanath Chukerwutty*. 1. Beng. S. D. R. p. 335. but what a brother acquires without using the patrimony he alone takes on a division.(b) *Jumeeyut Lal* v. *Huqeequt Rai*. 2. Macn. p. 155. Nor will it matter how the new acquisition so made is invested. *Ramasheshiah Panday* v. *Bhagavat Panday*. 4. Mad. H. Ct. R. p. 5.

A house built by one member at his own expense, with borrowed money, on property belonging to the family.(c) *Vithoba Bava* v. *Hariba Bava*. 6. Bomb. H. Ct. R. a. j. c. p. 54. Though the builder is entitled to compensation for his outlay. But in *Khodeeram Serma* v. *Tirlochun* 2. Macn. 152. s. c. 1. Beng. S. D. R. p. 35. a house built on ancestral land with joint-member's own funds was held to be not divisible. The other members have only a claim for similar land equal to their respective shares. Profits of ancestral estate are patrimony; and properties acquired by their means become joint-family property.(d) *Sudanund Mohaputtur* v. *Mt. Soorjoomooney Dey*. 2. Wym. c. r. p. 308.

The family dwelling house is subject to division, or sale of it, and division of the proceeds, if it be physically capable of division, or separate enjoyment. Marshall's App. C. p. 55. See *Sreemutty Shamasoondery Dossee* v. *Karteik Churn Mitter*. 1 Bourke. 327. *Koonwar Bijoy Keshub Roy Bahadur* v. *Shamasoonduree Dossee*. 2. Suth. Misc. c. p. 30. where a purchaser under a decree was put in possession of a share. See *Buddun Chunder Maduck* v. *Chunder Coomer Shaha* 5. Suth. c. r. p.

(a, b, & c) Menu. II. Dig. B. V. Ch. V. S. II. V. 348.
Yajnyawalkya. do V. 352.
Vyasa. do do V. 354.
Dayabhaga. Ch. VI. 1 to 4.
Mit. Ch. I. S. IV. 1 and 2.
Vyavahara Mayuka. Ch. IV. S. VII. 2.
Smriti. Chandrika. Ch. VII. 27 to 30.
Madhavya. 47.

(d) Dayabhaga. Ch. VI. S. I. 50. and Vide (a, b, and c.)

218. *Eshan Chunder Banerjee* v. *Nund Coomar Banerjee* 8. Suth. c. r. p. 239.

Lands held in *Parcyavally* are divisible *Sitaramiyar* v. *Aligiry Iyer*. 4. Mad. H. Ct. p. 255.

While the members of a Hindu family enjoy in common undivided property, money expended in its improvement or repair is considered as spent on behalf of all the members alike, and all have the benefit of the outlay when a division takes place.(a)

There is no rule of law precluding one member of an undivided Hindu family, though living together, from entering into an agreement with his co-parceners in respect of the expenditure on family property, and re-payment of self-acquired funds; and such an agreement is rendered more reasonable and probable where portions of the family-property are occupied and enjoyed by each of the members living separately. *Mutusawmy Gounden* v. *Subramanya Gounden*. 1. Mad. H. Ct. R. p. 309.

Where a Zemindary was acquired by one of four brothers living together, either with or without the aid of joint-funds, or with personal aid from the brothers, he was declared entitled to two-fifths, the other brothers to a fifth each. *Gudadhur Serma* v. *Ajodhearam Chowdry*. 1. Beng. S. D. R. p. 6.

Where an estate had passed from a family in which the rule was non-division, to one in which division obtained, it was held that the character impressed upon the estate by the first family was no bar to a division by the members of the second. *Gopal Das Sindh* v. *Nurotum Sindh*. 7. Beng. S. D. R. p. 195.

Who may compel a division.— It is sometimes loosely said that any member of an undivided family can compel a division. Many cases have decided on the right of particular members of the family to compel a division. but no case is to be found deciding who *cannot* compel a division. Probably it will be found that the right is co-incident with those who form the co-parcenery, and not all those who are entitled to offer the funeral oblations; that is to say, father, son, and grandson, uncles, and nephews; and, where any of those are dead, their representatives.(b) In *Nagalinga Moodelly* v. *Subramanya Moodelly* 1. Mad. H. Ct. R. p. 77, it was held that a son and grandson can compel a division of ancestral family property. The case is important as to the *time* of division *(post)* as well. There *Scotland* C. J. said, "The plaintiff may, I think, maintain the suit. I have had some difficulty in seeing how chapter I, sec. II, par. 7 of the Mitàksharà is to be reconciled with the placita in the 5th section of the same chapter. But upon consideration I think that they are not necessarily inconsistent, and that sons may compel a division of ancestral family property at the hands of their father. I must however be distinctly understood as deciding this with reference to ancestral property only. The Advocate General refers to Sir Thomas Strange's work on Hindù

(a) Mit. Ch. I. S. IV. 30 and 31. Dayabhaga. Ch. I. 2, 3, 9, and 35.
(b) Mit. Ch. I. S. I. 5 and 6. Ch. III. S. I. 16.

law, and no one can read the passages cited without coming to the conclusion that the opinion of that author was that, except in the instances he gives, namely, of civil death by entering into a religious order, and of degradation working a forfeiture of civil rights, sons could not compel a division. Sir Thomas Strange (i. 179), says "Whatever might be the case among the Hebrews, no Hndú can, according to the law as it prevails in the Bengal provinces, under any circumstances, say to his father, in the peremptory language of the prodigal, "Father, give me the portion of goods that falleth to me." The father may abdicate in favour of one, or of all, according to the limits imposed upon him by the law, if he thinks proper; but, with the exception of two cases, partition among the Hindús in the life-time of the father, whether of ancestral or acquired property, would seem to be at his will, not at the option of his sons," and in support of this he cites Menu IX. 104 and the Mitákshará, ch. I. sec. II. Turning to the latter we find at paragraph 7 "One period of 'partition is when the father 'desires separation, as expressed 'in the text. 'When the father 'makes a partition.' Another 'period is while the father lives, 'but is indifferent to wealth and 'disinclined to pleasure, and the 'mother is incapable of bearing 'more sons; at which time a 'partition is admissible at the 'option of sons against the fa-'ther's wish." Sir Thomas Strange proceeds (i. 179, 180):—"A text, indeed, of Menu 'is refered to, as shewing, that, 'if ancestral property belong to 'the father, the sons may at their 'pleasure exact a division of him, 'however reluctant; and it is true '(as has been already intimated,) 'that their claim upon property 'descended is stronger than upon 'what has been otherwise acquired; 'but the inference drawn in the 'Mitákshará, is at variance with 'the current of authorities inclu-'ding Menu himself; whose ob-'vious meaning, in the text re-'ferred to is simply that ancestral 'property *recovered*, without the 'use of the patrimony, classes, 'upon partition, with property '*acquired*." And, passing on to consider the law applicable to this Presidency, the same learned author says, (i. 184) "In the provinces dependant on the government of Madras, and elsewhere in the peninsula, the right of the son to exact partition of ancestral property, indpendent of the will of the father, appears authorized, but not without the existence of circumstances to warrant the measure; such as the father having become superannuated, and the mother past child-bearing, the sisters also married. And there are two occasions upon either of which, wherever the Hindú law prevails, dominion may be transferred from the father in his life, without his consent, whether the property claimed by the sons to be divided be ancestral, or acquired. These are, voluntary *devotion*, by which the father is considered as having renounced it, and *degradation* from caste, by which it is forfeited."

"I do not find in Sir Thomas Strange's work any thing to get rid of this qualification as to the right of sons to a division in their fa-

ther's life-time; and my mind was at one time in considerable doubt on the subject. But in Mr. Justice Strange's Manual of Hindú Law, the learned author states the law in the broadest possible terms. He says in sec. 238. "Sons may at their will, and irrespective of all circumstances "compel their father to divide "with them the ancestral property." And for that he cites the Mitácshara, chap I, sec, V. par. 8. Turning to that passage we find he is abundantly confirmed. It is in these words: "Thus, while the mother is capable of bearing more sons, and the father retains his wordly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." Certainly nothing can be more explicit,—and at par. II Vijnánecçvara says, "Menu likewise shows that the father, howêver reluctant, must divide with his sons at their pleasure, the effects acquired by the paternal grandfather;" and then he refers to the text in Menu, IX. 209, to which Sir Thomas Strange alludes when he says that the infgrence drawn in the Mitákshará is at variance with the current of authorities.

"I think we must consider the Mitácshará, chap. I, sec. II, par. 7, as applicable to the law governing the division of property generally, and sec. V, paragraphs 8 and 11, as applying to divisions of ancestral property.

"The Mitácshará, therefore, in my opinion, confirms the view taken by Mr. Justice Strange in his Manual(a)—and in this Presidency the Mitàcsharà is the governing authority. I think, therefore, that as to ancestral property a son—and therefore a grandson—may compel a division against the will of his father or grandfather." See acc. *Duyashunker Kasseeram* v. *Brijvullubh Moteechund.* 1. Morl. p. 483. § 32.

Thus, sons, under the *Mitacshara,* can compel their father to divide.(b) *Penauka Paty* v. *Appauyangar.* 2. Str. p. 216. *Turcapah* v. *Mullashiah* ib. 217. *Sarabiah* v. *Mulliah* ib. 219. ib. 220. See *Mitacshara* Ch. I. S. 2. VII. *Baboo Beer Kishore Suhye Singh.* v. *Baboo Hur Bullub Narrain Singh.* 7. Suth. c. r. p. 502. *Baboo Goursurn Doss* v. *Ram Surn Bhugut.* 1. Wym. c. r. p. 105. *Rajah Ram Tewary* v. *Luchmun Persaud.* 8. Suth. c. r. p. 15.

In Bengal, a son cannot compel his father to divide.(c) The distinction is thus pointed out in *Raja Suraneny Lukshmy Venkamah Row* v. *Narasima Row Bahadur.* 3. Mad. H. Ct. R. p. 48.

"According to the former school, it arises at partition; according to the schoool which prevails here, it is by birth. In Bengal, therefore, a partition made by a father in his life-time, he being not compellable to divide, would be an act of gratuitous liberality and an enriching of the sons by pre-dating the period at which their shares would vest in possession, and the transaction would therefore there assume all the properties of a gift, and many systems of positive law require delivery to effectuate a gift. In the

(a) Mit. Ch. I. S. V. 8.
(b) Mit. Ch. I. S. V. 8. Madhavya, 12.
(c) Dayabhaga, Ch. II. 7 and 8. Dayacrama Sangraha. Ch. VI. 1, 3, 4, 5, 6 and 7.

Benares school, however, the right of demanding a partition even in the life-time of the father is fully established, and the yielding of that which the law would enforce can in no way be regarded as an act of gratuitous liberality. He cannot be said to give who yields that which the law will compel him to yield." See, acc, *Kumla Kaunt Chuckerbutty* v. *Gooroo Govind Chowdry*. 4. Beng. S. D. R. p. 322.

In *Bombay*, a son cannot compel his father to divide *moveables*, or claim a separate share in an ancestral business, against his father's will.(a) *Ramachandra Dada Naik* v. *Dada Mahadev Naik* 1. Bomb. H. Ct. R. App. LXXVI. An ancestral trade descends, like other Hindu property, upon the members of an undivided family. *Ramlal Thakursidas* v. *Lakmichund Muniram*. ib. LII.

Division is claimable even to the fourth male in descent. 2. Macn. p. 152. And where property was given by a man to his grandsons, the son of a grandson dying, is entitled to a division. ib. p. 150.(b) See *Luchomun Persaud*. v. *Debee Persaud* 1. Suth. 317.

The right does not extend to collaterals.

Possession of a portion of ancestral estate in lieu of an annual dividend of the profits, will entitle the elder to claim a division. *Ranee Bhowanee Dibeh* v. *Ranee Soorujmunnee*. 1. Beng. S. D. R. p. 135. *Putabnarain* v. *Opindurnarain*. ib. p. 225.

As to the rights of absentees, they are, it is presumed, similar to those which appertain with respect to inheritance and succession; as to which see Post. '*Succession*.'

As to *Alya Sultana* law, see *Munda Chetti* v. *Timmaju Hensu*. 1. Mad. H. Ct. R. p. 380.

A widow cannot claim a division of her husband's estate under the *Mitacshara*: *Duljeet Singh* v. *Sheomunook Singh*. 1.(c) Bengal S. D. R. p. 59. *Aliter*, under the *Dayabhaga* in Bengal. See *Bhyroochund Rai* v. *Russoomunnee*. 1. Beng. S. D. R. p. 27. *Neelkaunt Rai* v. *Munnee Choudrain*. ib. p. 58. *Rani Bhavanni Dibee* v. *Ranee Soorujmuni*. ib. p. 135. *M. Jeeomooney Dossee* v. *Attaram Ghose*. F. Macn. p. 64. But though she cannot *claim*, she is entitled to a share *on* division.(d) She only holds her share for her life;(e) and a mother taking her share is on the same footing as a widow.(f) *Goorooper-saud Baee* v. *Seebchunder Bose*. F. Macn. p. 92. 72. See also *Mt. Joymunnee Dibia* v. *Fakeer Chunder Chuckerbutty*. 4. Beng. S. D. R. p. 337. *Naunkissen Mitter* v. *Muthoosoondaree Dossee*. 1. Fult. 389.

See *Sheo Dyal Tewaree* v. *Judoonath Tewaree*. 5. Wym. 55. s. c. 9. Suth. c. p. 61. In *Vencata Soobamal* v. *Venkum-*

(a) Vyavahara Mayuka. Ch. IV. S. IV. 4. Ch. I. S. I. 5.
(b) Dayabhaga. Ch. II. 9 and 10. Ch. XI. S. I. 34. Mit. Ch. I. S. V. 1 and 2. Vyavahara Mayuka. Ch. IV. S. III. 1. Dayacrama Sangraha. Ch. IX, XI. Menu. Ch. IX. 186.
(c) Vide (a) 288.
(d) Mit. Ch. I. S. VII. 1 and 2. Vyavahara Mayuka. Ch. IV. S. VI. 15 and 18. Madhaviya. 8 and 15. Smriti Chandrika. Ch. II. 38 and Ch. IV. 13.
(e) Dayabhaga. Ch. XI. S. I. 56 and 60. Dayacrama Sangraha. Ch. I. S. II. 3 and 4. Vyavahara Mayuka. Ch. IV. S. VIII. 4.
(f) Dayabhaga. Ch. XI. S. I. 56 and S. II. 31.

mall. 1. Mad. Sel. D. p. 211. the Court said,

"The family, in this case, was an undivided family, and the property in dispute was clearly ancestral property. Property of this decription, according to the best information which the Court had been able to procure, always descends to the charge and superintendence of the nearest heir, in succession; but is liable to partition, on the demand of any of the co-parceners. Whether the widow of a deceased co-parcener is entitled to claim a division of such property,—in other words, whether in the eye of the law she is considered as a co-parcener of the estate, and as such is vested with the same rights in the property as the other co-parceners, was the question, upon the determination of which the validity of the claim set up by Venkummal in this case mainly depended. This question had accordingly been referred by the Court for the opinion of their Hindoo Law Officers, whose answer is subjoined:

"A widow is not competent to "claim a share in undivided an- "cestral property; nor can she be "considered as a co-parcener of "the estate; and since she is not "a co-parcener she is not vested "with the same rights (in the "property) as the other co-par- "ceners."

"This is understood from the "chapter succession to property "of one who dies without a son" in the Law Book entitled Vignaneshwerum."

"The Court had no doubt whatever of the correctness of the foregoing answer. It was conformable to the exposition of the law contained in Section I. Chapter II. of the Mitacshara, a book of paramount authority in this part of India;(a) and the principle upon which it rested was admitted and acted upon by the Sudder Dewanny Adawlut in Calcutta, except in cases arising within the province of Bengal, where a different doctrine prevails, and the widow of a co-parcener, who leaves no male issue, is entitled to his share of the joint property."(b)

In *Ram Joshi bin Anant Joshi* v. *Laxmibai Kom Mahadeo Shridhar Joshi.* 1. Bomb. H. Ct. R. p. 189. it was held that it is competent to the childless widow of a Hindu, dying without other nearer heirs, to enforce the actual division of the family property, in which her husband at his death was entitled to share, where it was found that the separation of her husband had taken place and his share ascertained, though not actually set apart in specie.(c)

See *Mt. Raj Koonwar* v. *Mt. Dhunkoonwar.* 1. Borr. 207. s. c. 1. Morl. Dig. p. 484. § 45, where it was decided that the son-less widow of an undivided brother cannot enforce division of his share.(d) A widow may enforce an agreement to divide.(e) *Rajah Surameny Lakshmy Venkamah Row* v. *R. S. V. G. Narasima Row.* 3. Mad. H. Ct. p. 40. She may sue for her husband's joint-share in Bengal.(f) *Chunda Kant Surmah*

(a) Mit. Ch. 11. S. I. 20, 30 and 39. Vyavahara Mayuka. Ch. IV. S. VIII. 6.
(b) Dayabhaga. Ch. XI. S. I 1 to 9. Dayacrama Sangraha. Ch. I. S. II. 1.
(c) Mit. Ch. II. S. I. 30 and 39. Vyavahara Mayuka, Ch. IV. S. VIII. 2. and Vide (b) page 268.
(d) Mit. Ch. II. S. I. 20. Vyavahara Mayuka. Ch. IV. S. VIII. 6.
(e) Vide (a).
(f) Dayabhaga. Ch. XI. S. I. 1 to 9. Dayacrama Sangraha. Ch. I. S. II. 1.

v. *Bungsideb Surmah*, 2. Wym. c. r. p. 63. though she cannot sue for property which was never in her husband's possession. *Rewun Persaud* v. *Mt. Rhada Beebee*. 4. Moore's I. A. p. 176. unless he had a vested right in it. ib. *Hurrosoondery Debia Chowdry* v. *Rajessuree Dabia*. 2. Suth. c. r. p. 321. She cannot of course sue while a son is alive.(a) *Ram Kunnye Gossamee* v. *Meernomoyee Dossee*. ib. p. 49. and as to widow of undivided brother in Bombay, claiming his share in undivided residue, see 1. W. and Bühl. p. p. 6. 8. 9. Daughters cannot demand a partition. 2.(b) Str. p. 300. A mother, or grandmother cannot force a division, though she has a right to a share when a division takes place.(c) *Sheo Dyal Tewaree* v. *Judoonath Tewaree*. *Sheo Dyal Tewaree Chowdry* v. *Bishonath Tewaree Chowdry*. *Shib Dyal Tewaree* v. *Bishonath Tewaree* and *Judoonath Tewaree* v. *Bishonath Tewaree*. 9. Suth. c. r. p. 61.

Every member of a joint undivided family has an indefeasible right to demand a partition of his own share.(d) *Mt. Deo Bunsee Kooer* v. *Dwarkanath*. 10. Suth. c. r. p. 273. even though the majority dissent. ib. See also *Issur Chunder Bonerjee* v. *Nund Coomár Bonerjee*. 4. Wym. 117.

A suit for a division may be brought by a party out of possession *Doe. dem Ramnaut Seal* v. *Bulram Chunder*. 1. Morl. p. 211. A purchaser of a share in *a lakiraj* estate may compel a division of his share. *Futteh Bahadoor* v. *Jankee Bibee*. 13. Suth. c. r. p. 74. There the Court said,

"It seems to me, therefore, that he has an inherent right to enjoy his purchase in the way that he may think most advantageous to himself so long as that enjoyment does not interfere with the rights of his co-parceners. This has been declared in a judgment of the High Court in the case of Shama Soonduree Debia *versus* Jardine Skinner and Co., 12 Weekly Reporter, 160, where it is laid down that "in all cases "of joint-ownership, each party "has a right to demand and en- "force partition, in other words, "a right to be placed in a posi- "tion to enjoy his own right "separately and without interrup- "tion or interference by the "other." (Spencer's Equitable Jurisdiction, Court of Chancery, Volume I, page 653; Story's Equity Jurisprudence, Sections 648, 649).

"In this case, the parties were co-putneedars, and there was no question of Government revenue concerned.

"A similar ruling is to be found in the case of *Mothoor Chunder Kurmokar versus Manick Chunder Bungo* and others, 6 Weekly Reporter, 192. In this case the parties were co-sharers in a shikmee talook, and it was held that a suit for partition would lie in the Civil Court, the partition of the shikmee talookdar's share not affecting the Government revenue.

"And the rule that a purchaser is entitled to get possession of what he has bought is still more broadly laid down in the Full Bench decision of this Court passed in the case of *Koonwur Bijoy Keshub versus Shama Soonduree Dossee*

(*a*) Mit. Ch. II. S. I. 1. 2.
(*b*) Dayabhaga. Ch. XI. S. 1, 1 and 2.
(*b* & *c*) Smriti Chandrika. Ch. IV. 5 to 9.
(*d*) Vide (*a*) page 288.

2 Weekly Reporter, Miscellaneous Rulings, 30,(a) and it was decided that a Mahomedan purchaser of a share of a family house occupied by Hindoos was entitled to a separation of that share and to possesion after separation.

"The right to a partition by the Civil Court as between co-parcenerryots has also been laid down in the case of *Gouree Sunker Roy versus Anund Mohun Mitter* 9 Suth. c. r. p. 487."

A partition without the father's consent is illegal.(b) 2. Macn. p. 148. If his consent be given, it may be made in his absence. ib. p. 149. Without his consent, it does not even bind the sons who made it. ib. p. 150. It cannot be prevented by a will expressing a desire that the family should remain joint.(c) *Rajah Sooraneny Venkataputty Rao* v. *Rajah. S. Ramachendra Rao.* 1. Mad. Sel. Dec. p. 495. *Nubkissen Mitter* v. *Hurrischunder Mitter.* F. Macn. p. 323. s. p.

Time of Division.—In *Bengal* there are two periods at which division may take place, first when the father's property ceases; secondly by his choice, during his right of property.(d) See 2. Macn. p. 146. note 2. Str. p. 221. per *Ellis.* In *Bombay*, there are three periods, first, after the death of the father and mother, when the sons assembled may divide the whole estate; secondly, during the joint lives of the parents, if the mother be past child-bearing; thirdly, at any time, if made with the father's consent.(e) In *Madras*, there are four periods; first, when the father desires it; secondly, on his retiring from worldly affairs; thirdly, after the father's death; fourthly when the father is addicted to vice, is insane, old, or diseased.(f) Mitacshara Ch. IV. 11. § 7. as to which see *Nagalinga Mudali* v. *Subramanya Mudali.* 1. Mad. H. Ct. R. R. p. 77. per *Scotland.* C. J. *Supra.*

How property is to be shared.—Sons share equally. *T. Vencatacundal Row* v. *T. Jagganadha Row. supra* No larger share is given to the eldest son on the score of primogeniture. *Bhyrochund Rai* v. *Busoomunee.*(g) 1. Beng. S. D. p. 27. *Taliwur Sing* v. *Puhlwan Sing.* 3. ib. p. 301. *Sheobuksh Singh* v. *Futtih Singh.* 2. Macn. p. 1. and the issue of younger share equally with issue of elder son. ib. p. 2.(h) The division must be according to the number of sons, not the number of wives. This is called *Putrà Bhaga,* as distinguished from *Patni Bhaga* (see 1. Str. p. 181. ib. 2. p. 286.) *Mootoovengadachalasawmy* v. *Tombijiasawmy Manyiagar.* Mad. R. A. 20 of 1846. Mad. S. R. for 1849. p. 27. 30. *Poovathay* v. *Paroomal.* Mad. S. R. for 1856.

(a) Dayabhaga. Ch. II. 31.
Dayacrama Sangraha. Ch. XII. S. I. 9.
Nareda I. Dig. B. II. Ch. IV. S. I. V. 6.

(b) Dayabhaga. Ch. I. 38.
Dayacrama Sangraha. Ch. VI. I.
Bhandayana. II. Dig. B. V. Ch. I. S. II. V. 22.

(c) Dayabhaga. Ch. I. 35. Ch. III. S. I. 16.
Mit. Ch. I. S. II. 7. S. VI. 8.

(d) Dayabhaga. Ch. I. 38.

(e) Vyavahara Mayuka. Ch. IV. S. IV. 1, 2, 3 and 4.

(f) Mit. Ch. I. S. II. 7. S. V. 8.
Madhavya. Paras. 5, 6, and 8.
Smriti. Chandrika. Ch. I. 33, 34, 35 & 37.
Dayabhaga Ch. III. S. II. 25 to 27.
Dayacrama Sangraha. Ch. VII. 13.

(g) Mit. Ch. I. S. III. 2, 3, 4, and 7.
Vyavahara Mayuka. Ch. IV. S. IV. 18.
Madhavya. 8 and 9.
Smriti Chandrika. Ch. II. S. II. 2. Ch. III. 23 and 24.
Dayabhaga. Ch. III. S. II. 23. and S. I. 21.

(h) Vyavahara Mayuka. Ch. IV. S. IV. 20.
Madhavya. 13.
Smriti Chandrika. Ch. VIII. 1 to 8.

p. 5.(a) But where a division takes place after the father's death, and all his widows have an equal number of sons, the property may be equally divided by *Patni Bhaga*, leaving it to the widows to sub-divide among the children. *Sumrun Singh* v. *Khedun Singh* 2. Beng. S. R. p. 116. where the custom is called *Koolochar*. It is said that a custom to divide *Patni Bhaga* prevails among *Soodras* in contravention of the *Shastras*. 1. Str. p. 182. 2. Str. p. 289. 412. In *Temmakal* v. *Subamal*. 2. Mad. H. Ct. R. p. p. 47. it was held that a guardian might legally refer to a Punchayet the question whether the deceased's estates should be divided according to *Patni Bhaga* or *Putrà Bhaga*. See 1. Morl. N. S. p. 277. Note. 1.

Where a division was made by *widows*, it was held that the grand-mother was not entitled to a fifth share according to the *Dayabhaga*, Ch. I. S. 2. Ch. 2. which applies to divisions made by sons during their own lives. *Razu Monee Dossee* v. *Puddum Mokkee Dossee* 13. Suth. c. r. p. 66.(b) Where four brothers in co-partnership acquired property, it was divided into four shares, one to the representative of each brother, in the absence of proof of inequality of labour or funds used in its acquisition. *Mt. Dhurputtee* v. *Haradhun Sircar*. 3. Beng. S. D. R. p. 74.(c)

As a rule, ancestral property should be divided equally;(d) *Bhyrachund Rai* v. *Russoomunnee*. 1. Beng. S. D. R. p. 27. though the parties may by agreement come to an unequal division of it. (e) *Linga Malloo Pitchama* v. *Linga Mulloo Gooroopah*. Mad. S. R. for 1859. p. 84 In *Yekeyamian* v. *Aguiswarian* 4. Mad. H. Ct. p. 307. *(post)* an unequal division in favour of an adopted son was upheld, but that was on the ground that sons born after the division could not question it.(f)

The *jus representationis* prevails on division, just as it does in succession. Thus, on a division by one son, the sons of another son, and the father's widow, the widow will take one third, the son one third, and the two sons of the deceased son the other third. *Sibchunder Bose* v. *Gooroopersaud Bose*. F. Macn. p. 69.(g)

In *Bengal*, a father may unequally divide his self-acquisition or moveable property among his children. F. Macn. p. 65. 2. Macn. p. 147.(h) but *aliter* in *Madras* ib. note. But *semble*, that in *Bengal* an unequal distribution of *ancestral* estate is invalid.(i) See the unsatisfactory case of *Bhowany Churn Bunhoojea* v. *The Heirs*

(a) Virhaspati. II. Dig. B. V. Ch. I. S. II. V. 63.
(b) Dayabhaga. Ch. III. S. II. 25, 29 and 32.
(c) Dayabhaga. Ch. VI. S. I. 23.
(d) Dayabhaga. Ch. II. 15 and 19.
Dayacrama Sangraha. Ch. VI. 18.
Mit. Ch. I. S. V. 3 and S. II 6.
Vrihaspati. II. Dig. B. V. Ch. II. V. 93.
Vyasa. Do do. 94.
(e) Dayabhaga. Ch. III. S. II. 26.
Mit. Ch. I. S. III. 2.
S. II. 11 and 12.
(f) Mit. Ch. I. S. VI. 2 to 6.
(g) Dayabhaga. Ch. III. S. 1. 18.
Dayacrama Sangraha. Ch. I. S. I. 3,
Vyavahara Mayuka. Ch. IV. S. III. 1.
Ch. IV. S. IV. 20 and 21.
Smriti Chandrika. Ch. VIII. 6 to 8.
Madhavya. Paras. 13 and 14.
Menu. IX. 186.
Yajnyawalkya. II. Dig. B. V. Ch. II. V. 78.
Catyayana. do. V. 79.
Devala. do. V. 80, 81, & 82.
(h & i) Dayabhaga. Ch. II. 17, 22.
Dayacrama Sangraha. Ch. VI. 8 and 18, and 19.
Vishnu. II. Dig. B. V. Ch. I. S. II. V. 25.
Yajnyawalkya. do V. 26.
Vrihaspati. do V. 31.

of Ramkaunt Bunhoojea. 2. *Beng.* S. D. R. p. 202. *et ibi notam.* See also 1. Macn. Pr. p. 44-5. A father, in *Bengal,* making a division of his self-acquired landed property must reserve his own legal share (two shares) as long as his wife is capable of bearing children; for otherwise after-born children might be left unprovided for. 2. Macn. p. 145.(a) But a father is competent, even according to the *Mitacshara,* to give the portion which falls to his own lot on a division, to one of his sons, to the exclusion of the others. *Jyaka Pari* v. *Jusava Pari.* Mad.S. A. 121 of 1861. In that case the parties were Christians, but conforming to the customs of the Hindus.(b) Where one of the sharers is insane, his representatives take his share ib. p. 165.(c) But the son cannot claim the share which the father received for himself, if his widow and daughter survive him *Yejnamoorty Seetaramiah* v. *Chavaly Luchmanarsoo.* 2. Mad. S. D. p. 16. A son born after division takes the share allotted to his father on division. 1. W. and Bühl. p. 33.(d)

But the right of an after-born son or nephew depends on his having been conceived at the date of the division.(e) *Yekeyamian* v. *Agniswarian.* 4. Mad. H. Ct. R. p. 307. s. c. 4. Mad. Jur. p. 321. In this important case, the Court said, "The Civil Judge seems to have rested his decision mainly on the passage *in Chapter* 1 *Section* 1, *paragraph* 27, *of the Mitakshara.* referred to in his Judgment. Now the first observation that may be made is that it obviously relates to alienations by a father of family property away from the family, and we are considering a disposition by which provision was made for an adopted son having a right to a portion of the family property. But even assuming the text to be applicable to such a disposition, it does not we think, affect the 3rd defendant's right to the portion of land allotted to him. It states the conclusion of a disquisition on proprietary right by birth. "Therefore it is a settled point that property in the paternal or ancestral estate is by birth," and the context which follows "he (the father) is subject to the control of his sons and the rest in regard to the immoveable estate whether acquired by himself or inherited from his father or other predecessor," appears to be but the expression of a consequence of the right by birth. Whether the position is sound to its full extent we are not concerned to say. We have only to consider its fair import, and that is that the consent of sons is necessary to a disposition of immoveable property by reason of the right acquired at their birth. It is true that the text of *Vyasa* quoted at the end of the passage forbids a

(a) Dayabhaga. Ch. VII. 2.
(b) Mit. Ch. I. S. VI. 1 and 2.
(c) Dayabhaga. Ch. V. 11.
Mit. Ch. II. S. X. 2, 5 and 10.
(d) Dayabhaga. Ch. VII 1 to 5.
Mit. Ch. I. S. VI. 1 to 7.
Vyavahara Mayuka. Ch. IV. S. IV. 33, 34.
Smriti Chandrika. Ch. XIII. 6, 7, and 11.
Madhavya Paras 18, 19, and 20.
Vrihaspati, II. Dig. B. V. Ch. 11. 100.
Menu. Ch. IX. 216.
(e) Dayabhaga. Ch. VII. 6 and 8.
Mit. Ch. I. S. VI. 4, 5, 6, 8 to 12.
Vyvahara Mayuka. Ch. IV. S. IV. 35 & 36.
Smriti Chandrika. Ch. XIII. 1, 2, 9, 11, and 1 .
Madhavya. Paras. 19 and 21
Vrihaspati. II. Dig. B. V. Ch. II, V. 100.
Menu. Do do V. 101.

gift or sale for the sake of the support of sons unborn and even unbegotten, but it is at least very doubtful whether that text would be considered more than a moral precept in any case except in its relation to a gift on division provided for by the law of partition to be presently noticed. If, however, of any legal force in favor of all after-born sons, it is in principle inapplicable to the disposition to the 3rd defendant, for he was entitled to possession as a son by adoption and there is nothing in the case to shew that the father had not abundant means left with which to provide for the support of all his after-born sons.

"Then viewing the disposition as it was really made, namely, as a disposition to effect a divison between the 3rd defendant and his adoptive father, it remains to consider whether the law relating to partition warrants the claim of the plaintiffs—whether the rights of after-born sons to a share of the property divided, which no doubt is expressly declared, extends to sons not begotten at the time of the partition. The primary ordinance of *Menu, chapter* 9 *sl.* 216, is a son born after a division in the life-time of his father shall alone inherit the patrimony or shall have a share of it with the divided brethren, if they return and unite themselves with him. Upon this and the text of *Yajnyawalkya* when the sons have been separated, one who is afterwards born of a woman equal in class shares the distribution; and the texts of *Vrihaspati,* a son born before partition has no claim on the wealth of his parents nor one begotten after it on that of his brother. All the wealth which is acquired by the father who has made a partition with his sons goes to the son begotten by him after partition. Those born before it are declared to have no right. It is laid down in the *Mitakshara Chapter* 1, *sec,* 1, that one born of a wife of equal class after separation of sons from their father, takes the separate property of his parents or shares the goods with those re-united with the father after partition, and is not a proprietor of his brother's allotment." This relates to a division between a father and his sons; and in regard to a partition between brethren after their father's death, it is declared that one who is born after a separation of the brethren which took place subsequent to the death of the father at a time when the mother's pregnancy was not manifest, has a right to an equal allotment formed by contributions from the shares received by the brethren: and the same is declared to be the rule applicable in the case of a nephew born after the separation, the pregnancy of the brother's widow not having been manifest at the time of the partition.

"The same exposition of the law is given in the *Madhaiv Commentary on the law of Inheritance.* See Mr. Burnell's *Translation, page* 13; *in the Smriti Chandrika by Kristnasawmy Iyer, chapter* 13; and in the *Vyavahara Mayukha, Chapter* 4, *Section* 4, *para* 33 *et Seq.* It is to be found also in the *Daya Bhaga Chap.* 7, and seems to be upheld in Bengal even against the rule *Factum valet* obtaining there. Plainly then the right of an after-born son or nephew to share as a co-par-

cener divided property, depends upon the mother being pregnant with him at the time of the partition. From conception by his mother member-ship with the family is considered as commencing; accordingly it is enjoined in the same Section of the *Mitacshara* that if the mother is evidently pregnant, the distribution should be made after awaiting her delivery. It might be questioned whether this right of an after-born son was not even confined to aposthumous son. It appears to be so treated in 1 Stra; H. L. 207; but in reason there seems to be no admissible distinction between such a son and one born subsequent to the partition in his father's life-time, and at present we consider that if either of the plaintiffs had been begotten when the division took place in which the land in dispute was alloted to the 3rd defendant, he would have had a right to a portion of it. As however the fact is that neither of the plaintiffs was begotten until long after the division, we think the 3rd defendant has a valid right to his allotment as against them.

"The vakil of the Respondent referred in argument to the Pundit's opinion quoted in page 11 of *Mr. MacNaghten's Principles of Hindu law* and the author's comments upon it, as containing the recognition of a father's incompetency to make a valid disposition of ancestral property to a son while his wife continued to be capable of bearing children. But what appears there is simply a reference to passages which state as a condition of the right to make a division that the wife should be past child-bearing, in support of an opinion against the validity of a disposition by a father in favor of one of two sons living at the time, to the detriment of the other. That is no authority for the application of the position referred to in the present case. Further it is a position founded on the duty of caring alike for the support of sons born and that may be born, inculcated in the texts of *Vyasa* before adverted to and other sages; and there can be no doubt that it has not at the present day any legal prohibitory operation on the exercise of the right to make a partition. A division may be made by agreement, or be enforced between father and sons as well as between other co-parceners, and the express authoritative provisions, which we have just considered establish that the legal contingency of an after-born son subject to which the co-parceners take their portions, is strictly limited to a son begotten at the time that the division took place."

A widow is entitled to a son's share.(a) *Neelkunt Rai* v. *Munee Chowdrain*. 1. Beng. S. D. R. p. 58.

A mother's share is equal to that of a son. 2. Str. 290.(b) *Seebchunder Bhose* v. *Gooroopersaud Ghose*. F. Macn. 44. A childless widow is not entitled to share, but is entitled to have a fund set apart for her maintenance. ib. p. 62.

(a) Yajnyawalkya. II. Dig. B. V. Ch. II. V. 88. Dayabhaga. Ch. III. S. II. 31. Mit. Ch. I. S. II. 8, 9 and 10. S. VII. 1. Vyavahara Mayuka. Ch. IV. S. VI. 15. Ch. III. S. II. 30. Mit. Ch. I. S. VII. 1, 2. Dayacrama Sangraha. Ch. VII. 2. Vyavahara Mayuka. Ch. IV. S. IV. 18. Vrihaspati. II. Dig. B. V. Ch. II. V. 85.

(b) Dayabhaga. Ch. II. 65.

A husband may by will prevent his widow sharing on a partition by his sons. *Comul Moonee* v. *Joggopaul.* A daughter's share is one fourth of that of a male. 2. Str. p. 290. ib. 301.(a) On a partition between a father and his son in *Bengal*, the father is entitled to a share of his son's self-acquired property.(b) If acquired at the charge of the father's estate, the father is entitled to a moiety, the son who makes the acquisition to two shares, and the rest to one share each.(c) If the father's property has not been used, the father has two shares, the acquirer as many, and the rest are excluded from participation.(d) *Wooma Soonduree Dossee* v. *Dwarkanath Roy.* 11. Suth. c. r. p. 73. A father, it is said, may resume property made over by him to his sons, if he subsequently becomes indigent. 2. Macn. p. 148.(e)

In self-acquired property *i. e.* where the ancestral patrimony in no way enters into the cause of acquisition, only the acquirers share.(f) In *Calutty Pillay* v. *Yellay Pillay.* 1. Mad. Sel. D. p. 148. See *Mt. Doorputtee* v. *Haradun Sircar.* 3. Beng. S. D. R. p. 74. *Kripa Sindhu Patjoshi* v. *Kanhaya Acharya.* 5. Beng. S. D. R. p. 335. See 1. Fult. p. 165. The acquirer takes a double share where ancestral property has been used in making the acquisition in *Bengal.*(g) See *Sheo Dyal Tewaree* v. *Judoonath Tewaree.* 5. Wym. c. r. p. 55. s. c. 9. Suth. c. r. p. 61. *Gooroochurn Doss* v. *Gooluckmooney Dossee.* 1. Fult. 165. Where the acquirer, even by his own exertions, he is not entitled to a double share, if he be the manager. *Gooroochurn Dossee* v. *Goluckmonee Dossee.* 1. Fult. p. 165. The union of joint and separate sources of acquisition gives the property the character of joint and not, of separate acquisition. ib.(h) See *Sree Narrain Berah* v. *Gooroo Pershaud Berah.* 6. Suth. c. r. p. 219. *Kripa Sindhu Patjoshi* v. *Kanhaya Acharya.* 5. Beng. S. D. R. p. 335. 2. Macn. p. 158. *Vrishapati A. Shewchurnram* v. *Aghoree Kurtaram.* ib. p. 167. *aliter,* under the *Mitacshara.* p. 162. note. But see Str. Man. § 270. *Ramchundra Range* v.————Mad. Sel. D. 7 of 1814. p. 85. Where parties make unequal gains, the division shall be equal notwithstanding.(i) 2. Str. p. 384. and see *Gooroochurn Doss* v. *Gooluckmooney Dossee.* 1. Fult. 165.

Where a father divides his self-acquisition, he is entitled to two-thirds, his sons to one-third.(j) *Heirs of Pedda Mulrazue* v.————No. 7 of 1814. 1. Mad. Sel. D. p. 85. Where a father divides his self-acquired property voluntarily, he must not be capricious in its division.(k) *Bhowanny Churn Bunhoojea* v. *Heirs* of *Ramkaunt Bunhoojea.* 2. Beng. S. D. R. p.

(a) Vyavahara Mayuka. Ch. IV. S. IV. 10.
Dayabhaga. Ch. III. S. II. 34, 35, 36 & 38.
Menu. IX. 108.
Mit. Ch. I. S. VII. 5, 6 and 9.
Dayacrama Sangraha. Ch. VII. 9.
(b) Dayabhaga. Ch. II. 65 and 66.
Catyayana. II. Dig. B. V. Ch. II. V. 103.
(c) Dayabhaga. Ch. II. 71.
(d) Dayabhaga. Ch. II. 71.
(e) Dayacrama Sangraha. Ch. VI. 8.
Harita. II. Dig. B. V. Ch. I. S. II. V. 23.
(f) Dayabhaga. Ch. VI. S. 1, 28.
Mit. Ch. I. S. IV. 1 and 2.
Dayacrama Sangraha. Ch. IV. S. I. 6.
(g) Dayabhaga. Ch VI. S. I. 24 and 28.
Dayacrama Sangraha. Ch. IV. S. I. 3.
Vyasa. II. B. V. Ch. VI. S. I. 110.
(h) Dayabhaga. Ch. VI. S. I. 4.
Mit. Ch. I. S. V. 1 and 2.
(i) Mit. Ch. I. S. IV. 31.
Smriti Chandrika. Ch. VI. 1 to 3.
(j) Smriti Chandrika. Ch. II. S. I. 26 to 30.
(k) Dayacrama Sangraha. Ch. VI. 11 to 14.
Smriti Chandrika. Ch. II. S. I. 24.

202. Allotting share to wife and daughter with son is bad. *Sons of Veraragava Rauze* v. *Sons of Veraragava Range*. 1. Mad. Sel. D. p. 85. though after a division had taken place, a father may so allot what falls to his share. ib. See *Meenatchee* v. *Chedumbra Chetty*. Mad. S. R. for 1853. p. 61. an important case, in which these points were much considered. The property with which the father professed to deal was both real and personal, and was held to be self-acquired, notwithstanding he had inherited a house. There was both a deed *inter vivos*, and a *will*, which however was only confirmatory of the deed, and contemporaneous. The father left but a small portion of his estate to his adopted son, the bulk to his widow and daughter. The adopted son sued to recover the whole. There the Court said;

"The property is alleged by the Appellant to be self-acquired, but by the Respondent to be ancestral. It is allowed by both parties that the Appellant's late husband had inherited a house, beyond which he had no ancestral property at the time of this inheritance.

"The Court of Sudder Udalut are of opinion that the property in litigation is justly entitled to be considered as self-acquired. The circumstance of the Appellant's late husband having obtained a house upon the division of the family property with his brothers, does not in the opinion of the Court render, under Hindoo Law, all his subsequent acquisitions of real and personal property of the nature of ancestral property.

"Deeming the property for these reasons to be self-acquired, and with a view of ascertaining how far property of this description would affect the Hindoo Law as applicable to the points at issue, reference was made to the Pundits of the Court by the following questions :—

"1st Question to the Pundits of Court of Sudder Udalut.

"Can a Soodra during his lifetime execute a deed of division of his self-acquired property allotting a portion of it to his adopted son and the remainder of it to his wife and daughter? In addition to the aforesaid deed he executed a will recapitulating the conditions of the said deed. Does the circumstance of the Soodra in question having inherited a house, which house forms a portion of the property given to the son in any way affect the point at issue? the son was adopted previous to the Soodra's marriage with the wife, and the birth of the daughter above alluded to.

"1st Answer by the Pundits of the Court of Sudder Udalut.

"A deed of division of the kind mentioned in the question of the Court, cannot be executed, nor is a will made in accordance therewith valid, it being illegal by Hindoo Law that a deed of division should be executed allotting a share to a wife and a daughter in common with a son, insomuch as a wife and a daughter who have no right to property while a son is alive, are not capable of participating in the property together with a son.

"If after giving the son his share the residue be given over to the wife and daughter out of affection, such affectionate gift will be valid, provided it embraces only per-

sonality, and not real property which during the life-time of the son cannot be given away without his consent.

"It is consistent with Hindoo Law that the house, a real estate which descended by inheritance, should form a portion of the property given to the son. This circumstance in no way affects the point at issue.

"Question to the Pundits of the Court of Sudder Udalut.

"In the answer given by you to the 1st question put by the Court, you have stated that, if after giving the son his share, the residue be given over to the wife and daughter out of affection, such affectionate gift is valid if of personality, you are required to state the nature and extent of the share that by the Law it is necessary should be given to the son by his father, also in what manner the nature of such share is affected by the property being ancestral or self-acquired.

"If a gift to a widow and daughter consist of both real and personal property does such circumstance destroy entirely the gift in question?

"2nd. Answer by the Pundits.

"The Hindoo Law books "Vijnanaswareyan," &c., declare that a father who has acquired property by his own exertions is entitled on division to two-thirds, thereof, and his son to one-third. Consequently one-third is the nature and extent of the share that should be given to the son by his father out of his, the father's self-acquired property.

"If the property be ancestral, the son will be entitled to one-half of it, inasmuch as both the father and son must divide it in equal proportions.

"If after such division the father shall give away to his wife and daughter both real and personal property appertaining to his own share, such gifts will be valid inasmuch as his son has no longer any right to his share. If however in contradistinction to the above course, the father allots but a portion to his son according to his pleasure and gives away the remainder consisting both of real and personal property to his wife and daughter, such gifts to the wife and daughter will not be valid so far as it regards the real property inasmuch, as the said allotment to the son does not amount to a legal division between him and his father and the right of the son to the remainder of the property continues in force, but the gift to the said females as regards the personal property will be valid.

"From the answers given by the Law Officers it will be seen that under the Hindoo Law, as respects his personal property, the act of Appellant's late husband was legal."

Where a division takes place after the father's death, the sons take their shares *per capita*.(a) So do brothers, widows, and daughters.(b) Str. Man. § 229. Others take *per stirpes*. ib. Illegitimate sons of *Sudras* are entitled to half the share of legitimate sons. Str. M. § 246.(c)

Where two brothers lived together without any paternal estate, purchased lands and held them together for several years,

(a) Mit. Ch. I. S. III. 1.
(b) Smriti Chandrika. Ch. XI. 57.
Mit. Ch. II. S. IV. 1.
(c) Mit. Ch. II. S. XII. 2.

the elder brother having given the chief part of the purchase-money, both giving their labour to improve the property, the elder brother was declared entitled to two thirds.(a) *Koshul Chuckurwutty* v. *Radanath Chuckerwtty*. 1. Beng. S. D. R. p. 355. See also *Kripa Sindhu Patjosh* v. *Kanhaya Achayra*. 5. Beng. S. R. p. 335. *Sibdyal Tewaree* v. *Juddoonath Tewaree*. 5. Wym. c. r. p. 55.

Where family or joint-property is *recovered*, the recoverer is entitled to consideration for his exertions, on a division taking place.

The Hindoo Law on the subject of "recovered" property applies to cases in which the property has passed from the family to strangers, and has been held by them adversely to the family, and not to cases where the property has been held by one claiming (though unfoundedly) to be a member of the family.(b)

Merely obtaining a decree for possession is not "recovering" the property. But see *Radhachurn Rai* v. *Kishenchund Rai*. 1. Beng. S. D. R. p. 33.

Recovery, if not made with the privity of the co-heir, must at least be *bonâ fide* and not in fraud, or by anticipation of the intentions of the co-heir.(c) *Bisessur Chuckerbutty* v. *Seetul Chunder Chuckerbutty*. 9. Suth. c. r. p. 69. s. c. 5. Wym. c. r. p. 135, 201. Where the father is the recoverer, the question is whether the recovery has been effected by him exclusively of any family funds or aid. Got back by the labour and expense of the recoverer, it becomes his self-acquisition ; and is not liable to partition.(d) See 1. Str. p. 217. 2. Str. 311. *Gooroo Pershaud Roy* v. *Deebee Pershaud Tewaree*. 6. Suth. c. r. p. 58.

Where a co-heir recovers by aid of the family-funds, he is entitled to one-fourth over and above his own ; the merit of recovery is not treated as equal to that of new-acquisition.(e) 1. Sir. T. Strange p. 220. 2. Macn. p. 157. In *Bisheswar Chakravarti* v. *Shitul Chundra Chakravarti*. 8. Suth. c. r. p. 13. the Court declined to extend to all the remote branches of a Hindoo family, separate in mess and estate, and having no common interests like those of brothers, the doctrine laid down in a solitary case in which an elder brother, who recovered certain property by his own money and labour, was awarded two-thirds of a property, and the younger brother obtained only one-third.

Partial Division.—Such a division may take place, the family continuing joint as to the residue. See the Leading Case, *supra*. *Rewun Persaud* v. *Mt. Rhada Beeby* 4. Moore's I. A. p. 168. *Mooneyen* v. *Moottun*. Mad. S. R. for 1858. p. 153. *Widow of Macundoss Balubdoss* v. *Ganpatrao Gopinath*. Perry's O. C. p. 143. *Yetiraj Ummah* v. *Tayamal*. Mad. S. R. for 1854. p. 184. *Timmy Reddy* v. *Achama*. 2. Mad. H. Ct. R. p. 325. over-ruling Strange's Manual § 286. stating that where a partial division has occurred, the family is to be considered divided. *in toto* And see R. A. 25 of 1860. Mad. S. R. for 1861. p. 136. In *Timmy Reddy* v. *Achamah*, the Court said ;

"There seems nothing in prin-

(a) Dayabhaga. Ch. II. 46.
(b) Mit. Ch. I. S. IV. 2.
(c) Do do 2.
(d) Mit. Ch. I. S. IV. 6.
(e) Do do 3.

ciple to prevent the members of a family from being considered divided as to a portion of their property while the status of non-division with all the incidents of joint tenancy attaches to the portion which, for any reason of convenience or otherwise, they have chosen to leave undivided."

Thus where a family divided the accumulations of income of a late Hindu, they were held still to remain undivided. *Sonatun Bysaik* v. *Sreemutty Juggutsoondree Dosee.* 8. Moore's I. A. p. 66. See *Mt. Hoobat Konwar v. Man. Singh.* 4. N. W. P. R. p. 37. The produce passes with the share. *Hurrurai* v. *Pulwan Singh.* 7. N. W. P. R. p. 71. s. p. *Mahomid Oomur* v. *Pirthee Singh* N. W. Pr. R. for 1860. p. 692. *Nirunjun Singh* v. *Pershad Singh.* ib. Decision 14. July 1851. Rent is demandable from a co-sharer continuing to cultivate the share of another after division. *Rugnath Misser* v. *Sheik Cheerag* N. W. Pr. R. for 1860 p. 235. As there may be a partial division with respect to the property, so it is every day's practice that there may be a division as to one or more members, the rest remaining joint. Str. Man. § 249.

The *residue* falls under the ordinary rules which govern joint undivided property. *The Shevagunga Case* 9. Moore's I. A. p. 539, *Timmy Reddy* v. *Achama.* 2. Mad. H. Ct. R. p. 325. *Sreemutty Shamasoondaree Dossee* v. *Kartick Churn Mitter.* 1. Bourke p. 337, where it was contended that a family dwelling house, which on a division had been left undivided, could not be treated as subject to a division. But *Macpherson* J, said;

"The first question, whether the plaintiffs are barred by reason of the premises of which partition is sought, being an undivided residue of the property of a joint *Hindú* family, must, in my opinion, be decided in favour of the plaintiffs.

"Mr. *Bourke* has quoted from several authorities on *Hindú* law, but I do not consider that they are exactly in point with this case, and I am not prepared to follow the doctrine he contends for, unsupported by any more distinct authority. Further, my belief is that the doctrine in question refers to a partition made by the father amongst his sons and their co-heirs, and that it does not refer to the case of a partition by the joint owners amongst themselves; and in other authorities, referred to in the treatises of *Elberling* and *Strange* ample provision is made for subsequent partition, when any part of the property of a joint *Hindú* family has been left out, concealed, or secreted. On the whole, I think the subject of the present action does not fall in the category of things absolutely impartible."

Limitation and other bars to suit for division.—To bar a suit for division there must have been absolute exclusion for twelve years. *Subbiah* v. *Rajaswara Sastralu* 4. Mad. Jur. p. 448. See *Prasunna Rauzge* v. *Kistnama Rauzge* 11 of 1815 Mad. S. A. Decree. What amounts to absolute exclusion must depend on the circumstances of each case. ib. See *Mt. Deo Bunsee Kooer* v. *Dwarkanath.* 10. Suth. c. r. p. 273. No suit will lie for fresh division after the property has already been divided, where of

course there is no surprize, fraud, or the like. *Sheo Doss* v. *Mt. Longee.* 6. N. W. P. R. p. 145. See Str. Man. § 269.

The suit must embrace all the family property; there can be no second suit for other property. *Dosari Kolappa* v. *Dosari Suba Chetty* R. A. 11 of 1860 Mad. S. R. for 1861 p. 86. But property subsequently discovered may be the subject of a fresh division. Str. Man. § 268 and consequently, of a fresh suit. The Court, it has been ruled, can refuse to decree a division, where it would be detrimental to the sharers. *Durbaree Singh* v. *Salegram.* 7. N. W. P. R. p. 271. An acquiescence in an irregular division was upheld: *Khunnya Pandee* v. *R. D. Pandee.* 9. N. W. P. R. 383. But it is presumed that the acquiescence must extend to the legal term of twelve years. In a suit for a division of an entire share, no decree will be pronounced for a division of a part only. *Dulwan Rai* v. *Akbar Rai.* 9. N. W. Pr. R. p. 28.

A decree for a division is a judgment *in rem. Nursamal* v. *Mathewa Charry.* 309 of 1861. Mad. Rep. for 1862. p. 35. *Sed quære.*

The rights of an absentee and his progeny are kept alive till the sixth generation. 1. Str. 187. 188.

A division entered upon in compromise of a suit, and for putting an end to litigation previously entered into by their father by two brothers, will not be set aside without strict proof of precipitancy, in equality, restraint, coercion, or fraud. *Maharajah Hetnarain Singh* v. *Modnarain Singh.* 3. Suth. P. C. p. 51. s. c. Moore's I. A. p. 311.

APPENDIX TO MARRIAGE CONTRACT.

Page.

VRIHASPATI.—Things once delivered, on the following eight accounts cannot be resumed, as wages, for the pleasure of hearing poets or musicians and the like, as the price of goods sold, as *a nuptial gift to a bride* or her family, as an acknowledgment to a benefactor, as a present to a worthy man, from natural affection, or from friendship..... 2 *a*

NAREDA.—They who know the law of gifts, declare, that things once delivered as the price of goods sold, as wages, for the pleasure of hearing poets, musicians or the like, from natural affection, as an acknowledgment to a benefactor, as *a nuptial gift to a bride* or her family, and through regard, cannot be resumed..... 2 *a*

VYAVAHARA MAYUKA.—Nareda, thus propounds the distinction of gifts, valid and void: "Valid gifts are declared to be of seven sorts; void gifts assume sixteen forms." "They who know the law of gifts, declare, that things once delivered as the price of goods sold; as wages; for (the) pleasure (of hearing poets, musicians or the like;) from natural affection: as an acknowledgment to a benefactor; as *a nuptial gift to a bride* (or her family;) and through regard, cannot be resumed." Regard, religious purposes..... 2 *a*

YAJNYAWALKYA.—In the disposal of a girl, *the father, the paternal grandfather, the brother, a kinsman, or the natural mother*, shall be consulted in the order here specified: upon the death of the first, the right of giving away the damsel devolves on each of the others successively, provided they be of sound understanding..... 2 *b*

MENU.—*Let no man of sense, who has once given his daughter to a suitor, give her again to another*; for he, who gives away his daughter, whom he had before given, incurs the guilt and fine of speaking falsely in a cause concerning mankind..... 4 *a*

YAJNYAWALKYA.—*Once is a damsel given in marriage;* he who detains her shall incur the punishment of a thief: but if a worthier bridegroom offer he may take the damsel though given away, provided the first were undeserving..... 4 *a*

Do. ..... 5 *a*

Do. ..... 11 *b*

VASISHTHA.—From a man of contemptible birth, from an eunuch or the like; from a degraded man, from one afflicted with epilepsy, vicious, or tainted with shocking diseases, and from a frequenter of harlots.

Page.

2. A parent may take back a damsel, though given away ; and so may he once married to a man known from his family name to be sprung from the same primitive stock..... 4 *a*

MITACSHARA.—26 On occasion of treating of woman's property, the author adds something concerning a betrothed ; "For detaining a damsel, after affiancing her, the offender should be fined, and should also make good the expenditure together with interest.

27. One, who has verbally given a damsel (in marriage) but retracts the gift, must be fined by the king, in proportion to (the amount of) the property or (the magnitude of) the offence ; and according to (the rank of the parties, their qualities, and) other circumstances. This is applicable, if there be no sufficient motive for retracting the engagement. But, if there be good cause, he shall not be fined, since retraction is authorized in such a case. "The damsel, though betrothed, may be withheld, if a preferable suitor present himself."..... 4 *a*

Do. ..... 5 *a*

MENU.—' When the bridegroom, *having given as much wealth as he can afford to the father and paternal kinsman, and to the damsal herself,* takes her voluntarily as his bride, that marriage is named *Asura*..... 4 *b*

YAJNYAWALKYA.—In the Brahma nuptials the damsel is given by her father, when he has decked her as elegantly as he can, to the bridegroom, whom he has invited ; in the Daiva, to the priest employed in performing the sacrifice ; in the Arsha, to the bridegroom, from whom he receives, for religious purposes, a bull and a cow.

2. When the father gives her to a suitor, saying, "perform all duties together," the marriage is named Càya (or Prajapatya) ; and a son produced by it confers purity on himself and six descendants in a male line.

3. *An Asura marriage is contracted by receiving property from the bridegroom ;* a Gandharva, by reciprocal amorous agreement ; a Racshasa, by seizure in war, a Paisacha by deceiving the damsel.

4. The four first are approved in the case of a priest ; the Gandharva and Racshasa marriages are permitted for a soldier ; the Asura ceremony is peculiar to mercantile and servile men ; the Paisacha marriage is reprobated for all.

NAREDA.—*Thus proceeds* :—

This law is declared in regard to five forms of marriage, namely, the ceremony of Brahma and the rest (the ceremony of the Devas, of the Rishis, of the Prajapaties, and of the Gandharvas) ; but the gift requires excellent qualities in the bridegroom for its irrevocable validity in three forms of marriage, namely, the ceremony of the Asuras and the rest (the ceremony of the Racshasas and that of the Pisachas.)

Page.

MITACSHARA.—Whatever has been expended, on account of the espousals, by the (intended) bridegroom, (or by his father, or guardian,) for the gratification of his own or of the damsel's relations, must be re-paid in full, with interest, by the affiancer to the bridegroom.

Should a damsel, any how affianced, die before the completion of the marriage, what is to be done in that case? The author replies, "If she die (after troth plighted,) let the bridegroom take back the gifts which he had presented; paying however the charges on both sides... 4 *c*

VYAVAHARA MAYUKHA.—But what Cankha says: 5 "The lover (may take back) his nuptial present (on the death of his betrothed mistress,") must be understood of one, dying previous to the celebration of the marriage. Here it is further remarked by Yajnyawalkya 6 "If she die (after troth plighted), let the bridegroom take back the gifts which he had presented; paying however, the charges on both sides." The meaning is, that the husband may take back, if his bride be dead, what remains of the perquisite previously given, after calculating the expenses, incurred by himself and by her father..... 4 *c*

CATYAYANA.—If a damsel is betrothed to two or more persons, and the first bridegroom arrive before the second nuptials are completed, then, of all persons to whom she is promised, he to whom the first promise was made shall obtain her.

2. And the other shall recover what he had given to the bride: but if the first bridegroom arrive when the second nuptials have been consummated, he shall receive back what he had given..... 5 *a*

MENU.—The gift of daughters in marriage by the sacerdotal class, is most approved, when they previously have poured water into the hands of the bridegroom, but the ceremonies of *the other classes may be performed according to their several fancies*..... 5 *b*

MENU.—The recitation of holy texts, and the sacrifice ordained by the Lord of creatures, are used in marriages for the sake of procuring good fortune, to brides: but the first gift, or *troth plighted*, by the husband, is the primary cause and origin of marital dominion.

MENU.—The nuptial texts are a certain rule in regard to wedlock, and the bridal contract is known by the learned to be complete and irrevocable on the seventh step of the married pair, hand in hand, after those texts have been pronounced..... 5 *b*

MENU.—Now learn compendiously the eight forms of the nuptial ceremony, used by the four classes, some good, and some bad, in this world, and in the next.

'The ceremony of Brahma, of the Devas, of the Rishis, of the Prajapatis, of the Asuras, of the Gandharvas, and of the Racshasas; the eighth and basest, is that of the Pisachas.

Page.

'Which of them is permitted by law to each class and what are the good and bad properties of each ceremony, all this I will fully declare to you, together with the qualities, good, and bad of the offspring.

'Let mankind know, that the six first indirect order are *by some held* valid in the case of a priest; the four last, in that of warrior; and the same four except the Racshasa marriage, in the cases of a merchant and a man of the servile class.

'Some consider the four first only as approved in the case of a priest; one, that of Racshasas, as peculiar to a soldier; and that of Asuras, to a mercantile and a servile man.

'But in this code, three of the five last are held legal, and two illegal; the ceremonies of Pisachas and Asuras must never be performed.

'For a military man the before mentioned marriages of Gandharvas and Racshasas, whether separate or mixed, as when a girl is made captive by her lover, after a victory over her kinsmen, are permitted by law..... 5 *c*

MENU.—'That the human-race might be multiplied, He caused the Brahman, the Kshatriya, the Vaisya, and the Sudra (so named from the scripture, protection, wealth, and labour) to proceed from his mouth, his arm, his thigh, and his foot..... 5 *d*

MENU.—'For the first marriage of the twice-born classes, a woman of the same class is recommended, but *for such as are impelled by inclination to marry again, women in the direct order of the classes are to be preferred.*

'A wife who drinks any spirituous liquors, who acts immorally, who shows hatred to her lord, who is incurably diseased, who is mischievous, who wastes his property; may at all times be superseded by another wife.

'A barren wife, may be superseded by another in the eighth year: she, whose children are all dead, in the tenth; she, who brings forth only daughters, in the eleventh; she, who speaks unkindly, without delay.

'But she, who, though afflicted with illness, is beloved and virtuous, must never be disgraced, though she may be superseded by another wife with her own consent'..... 8 *a*

YAJNYAWALKYA.—One who drinks inebriating liquors, who is incurably diseased, who is quarrelsome, or barren, who wastes his wealth, who speaks unkindly, who brings forth only daughters, may be superseded by another wife; and so may she who manifests hatred to her husband. 8 *a*

Do. ..... 11 *a*

Page.

YAJNYAWALKYA.—He who forsakes a wife, though obedient to his commands, diligent in house-hold management, mother of an excellent son, and speaking kindly, shall be compelled to pay the third part of his wealth; or if poor, to provide a maintenance for that wife.,..... 8 *a*

Do. ..... 31 *a*

Do. ..... 37 *a*

Do. ..... 38 *b*

NAREDA.—The man who abandons an unblemished damsel after accepting her, shall be amerced in a pecuniary fine; and he must marry that damsel..... 8 *b*

BRAHMEPURANA.—A man of the servile class universally obtains marriage as his only sacrament..... 9 *a*

YAJNYAWALKYA.—For any of the brothers, whose investiture and other ceremonies had not been performed by the father, those ceremonies shall be performed by brothers, of whom the sacraments have been completed; and for their sisters, by giving a fourth part of their respective shares.

VYASA.—For any of the brothers, whose investiture and other ceremonies had not been performed, the other brothers, of whom the sacraments have already been completed, shall perform those ceremonies at the expense of the paternal estate; and for unmarried sisters the sacrament shall be completed by their elder brothers, as the law requires.

NAREDA.—A debt contracted by the wife shall by no means bind the husband, unless it were for necessaries at a time of great distress: a man is indispensably bound to support his family..... 9 *b*

Do. ..... 31 *a*

YAJNYAWALKYA.—Neither shall a wife or mother be in general compelled to pay a debt contracted by her husband or son, nor a father to pay a debt contracted by his son, unless it were for the behoof of the family; *nor a husband to pay a debt contracted by his wife*..... 9 *b*

YAJNYAWALKYA.—*Katyayana* says 6:—

"Debts incurred for domestic uses, by the slave, wife, mother, or disciple, of one gone to a far country, or deceased, and also by his son, must be paid, so says Bhrgu." And Yajnyawalkya holds: 7 "A woman shall not pay debts incurred by her husband or son; neither a father those of his son, nor a husband those of his wife, unless contracted on account of the family." Catyayana: That must be paid, which may have been verbally promised, as well as what has been engaged for to another." Nareda 8 "A father must pay the debt of his son, contracted in a time of distress." *Yajnyawalkya* 9 "*If the wife of a herdsman, a vintner, a dancer, a washerman, or*

Page.

a hunter, contract a debt, the husband shall pay it, because his livelihood chiefly depends on the labour of such a wife." The same author says 10: "A debt acknowledged (by her husband) or contracted by her jointly with her husband or son, or contracted by the woman herself, must be paid by a wife or mother; no other debt shall a woman be compelled to pay." And even if not acknowledged, she shall still pay it, if she have received his estate: for, thus says Catyayana: 1 "If a wife be thus addressed by her lord at the point of death, (or just before a long journey.) 'Such a debt must be paid by thee, she must pay it however unwilling, if assets were left in her hands." Nareda 2 "But if a woman who has male issue (but no several property) desert her son, and recur to another man, her son alone must pay the whole debt." This however refers particularly to a son who has got possession of his father's wealth. Nareda. 3 "A debt contracted before partition by an uncle, or a brother, or a mother, for the support of the family, all the parceners or joint-tenants shall discharge"..... 10 *a*

MENU.—When the husband has performed the nuptial rites with text of the Veda, he gives bliss continually to his wife here below, both in season and out of season; and he will give her happiness in the next world.

2. Though unobservant of approved usages, or enamoured of another woman, or devoid of good qualities, yet a husband must constantly be revered as a god by a virtuous wife.

3. No sacrifice is allowed to women apart from their husbands, no religious rite, no fasting; as far only as a wife honours her lord, so far she is exalted in heaven.

4. A faithful wife, who wishes to attain in heaven the mansion of her husband, must do nothing unkind to him, be he living or dead.... 10 *b*

Do. ..... 38 *c*

NAREDA.—It is a crime in them both, if they desert each other, or if they persist in mutual altercation, except in the case of adultery by a guarded wife.

2. Let a man banish from his house a wife who embezzles all his wealth under pretence of female property, or who procures an abortion, or who wishes the death of her husband..... 11 *a*

Do. ..... 38 *a*

Do. ..... 38 *b*

BAUDHAYANA.—Prudent men forsake a wife who neglects due attendance, who is barren, or immoral, or who frequents the houses of strangers; they instantly forsake one who speaks unkindly.

Page.

In the tenth year a man may forsake one who bears no children; in the twelfth, one who bears daughters only; in the fifteenth, one whose children are all dead; but instantly one who speaks unkindly.

MENU.—A wife who drinks any spirituous liquors, who acts immorally who shows hatred to her lord, who is incurably diseased, who is mischievous, who wastes his property, may at all times be superseded by another wife.

MENU.—A barren wife may be superseded by another in the eighth year; she whose children are all dead, in the tenth; she who brings forth only daughters, in the eleventh; she who speaks unkindly, without delay.

MENU.—The nuptial texts are a certain rule in regard to wedlock; and the bridal contract is known by the learned to be complete and irrevocable on the seventh step of the married pair, hand in hand after those texts have been pronounced..... 11 *b*

MENU.—Neither by sale nor desertion can a wife be released from her husband: thus we fully acknowledge the law enacted of old by the Lord of creatures..... 12 *a*

MENU.—372. And let him place the adulterer on an iron bed well heated, under which the executioners shall throw logs continually, till the sinful wretch be there burnt to death..... 12 *b*

MENU.—373. Of a man once, convicted, and a year after guilty of the same crime, the fine must be doubled; so it must, if he be connected with the daughter of an out-caste or with a Chandali woman.

374. A mechanic or servile man; having an adulterous connexion with a womam of a twice-born class, whether guarded at home or unguarded, shall thus be punished: if she was unguarded, he shall lose the part offending, and his whole substance; if guarded, and a priestess, every thing, even his life.

375. For adultery with a guarded priestess, a merchant shall forfeit all his wealth after imprisonment for a year; a soldier shall be fined a thousand fanas, and be shaved with the urine of an ass.

376. But, if a merchant or soldier commit adultery with a woman of the sacerdotal class, whom her husband guards not at home, the king shall only fine the merchant five hundred, and the soldier a thousand.

377. Both of them, however if they commit that offence with a priestess not only guarded, but eminent for good qualities, shall be punished like men of the servile class or be burnt in a fire of drygrass or reeds.

Page.

378. A Brahman, who carnally knows a guarded woman without her free will, must be fined a thousand fanas; but only five hundred if he knew her with her free consent.

379. Ignominious tonsure is ordained; instead of capital punishment, for an adulterer of the priestly class, where the punishment of other classes may extend to loss of life.

380. Never shall the king slay a Brahman, though convicted of all possible crimes: let him banish the offender from his realm, but with all his property secure and his body unhurt.

381. No greater crime is known, on earth than slaying a Brahman; and the king, therefore, must not even form in his mind an idea of killing a priest.

382. If a merchant converse criminally with a guarded woman of the military, or a soldier with one of the mercantile class, they both deserve the same punishment as in the case of a priestess unguarded.

383. But a Brahman, who shall commit adultery with a guarded woman of those two classes, must be fined a thousand fanas; and for the like offence with a guarded woman of the servile class, the fine of a soldier or a merchant shall be also one thousand.

384. For adultery with a woman of the military class, if unguarded, the fine of a merchant is five hundred; but a soldier, for the converse of that offence, must be shaved with urine, or pay the fine just mentioned.

385. A priest shall pay five hundred fanas if he connect himself criminally with an unguarded woman of the military, commercial, or servile class; and a thousand, for such a connexion with a woman of a vile mixed breed.

MADHAVYA.—*Yajnyawalkya* states the rule for the (partition of Stridhana:) "What a father, mother, husband, or brother, has given her, what is presented before the marriage-fire, and what she gets on her husband's second marriage, &c., that is called Stridhana." What is given (as a nuptial present) by her relatives, her Culka, and presents made after her marriage, if she die without offspring let her bandhavas take." "What is presented before the marriage-fire," *(i. e.)* what is given by her maternal uncles, &c., before the fire at the time of marriage, as Catyayana says:—"What is given to woman at the time of marriage before the fire, that is called by the good, Stridhana presented before the marriage-fire."

"What she gets on her husband's second marriage," *(i. e.)* what is given to a superseded wife on account of (her husband's) second marriage.

Page.

By the words "et cetera" property purchased with what is given during the procession, &c., is included..... 22 *b*

V. M.—Menu. 2.

Six-fold is here used in order to prevent (its reduction to) a smaller number, a (position) which borne out by the word other in the following text of Yajnyawalkya.2 "What was given to woman by the father, the mother, the husband or a brother; or received by her at the nuptial fire (Adhyagni), or presented on her supersession (adhivedanika), *as also any other* (*separate acquisition*), is denominated a woman's property." Vishnu, likewise specifies more (than those six). "What has been given to a woman by her father, her mother, her son or her brother; what has been received by her before the nuptial fire, (Adhyagnyupaguta), what has been presented to her on her husband's espousal of another wife (adhevedanika) what has been given to her by kindred, as well as her perquisite (Culka) and a gift subseqent (Anvadheyika), are a woman's separate property..... 23 *a*

Do. ..... 29 *a*

MITACSHARA.—That which was given by the father, by the mother, by the husband, or by a brother; and that, which was presented (to the bride) by the maternal uncles and the rest (as paternal uncles, maternal aunts &c.,) at the time of the wedding, before the nuptial fire; and a gift on a second marriage, or gratuity on account of supersession, as will be subsequently explained, ("To a woman whose husband marries a second wife let him give an equal sum as a compensation for the supersession," and *also property which she may have acquired by inheritance, purchase partition, seizure or finding are* denominated by Menu and the rest 'woman's property.'..... 23 *a*

Do. ..... 29 *a*

MENU.—"What was given before the nuptial fire, what was given on the bridal procession, what was given in token of love, and what was received from a brother, a mother, or a father, are considered as the six-fold separate property of a married woman..... 24 *a*

YAJNYAWALKYA.—What a father, a mother, a husband, or a brother, has given to a woman, what is presented to her before the nuptial fire, what she receives to appease and console her on the second marriage of her lord, are universally considered as her separate property.

CATYAYANA.—Whatever is given to women at the time of their marriage before the sacred fire which is the witness of nuptials, is denominated by sages their property given before the nuptial fire.

What a woman receives from the family of her parents, while she is led to the house of her husband, is called the property of a woman "given at her procession."

Page.

What a woman, either after marriage or before it, either in the mansion of her husband or of her father, receives from her lord, or her parents, is called a gift from affectionate kindred.

And such a gift having by them been presented through kindness, that the women possessing it may live well, is declared by law to be their absolute property.

The absolute exclusive dominion of women over such a gift is perpetually celebrated; and they have power to sell or give it away as they please, even though it consist of lands and houses.

Neither the husband, nor the son, nor the father, nor the brother, have power to use or to alien the legal property of a woman.

And if any of them shall consume such property against her own consent, he shall be compelled to pay its value with interest to her, and shall also pay a fine to the king.

But if he consume it with her assent, after an amicable transaction, he shall pay the principal only; when he has wealth enough to restore it.

Whatever she has put amicably into the hands of her husband afflicted by disease, suffering distress, or sorely pressed by creditors, he should repay that by his own free will..... 24 *a*

Do. ..... 24 *c*
Do. ..... 25 *e*
Do. ..... 26 *a*
Do. ..... 27 *b*
Do. ..... 29 *b*
Do. ..... 29 *c*

VISHNU.—The property of a female is that which her father, mother, friend, or brother has given her; what she received in the presence of the nuptial fire; on the bridal procession; or when her husband took a second wife; what her husband agrees to be her perquisite, and what is received from his or her kinsman as a gift subsequent to the marriage.

NAREDA.—Gifts to a woman at the nuptial fire, at her procession, by her husband, her brother, her father, or her mother, constitute her six-fold property.

MITACSHARA.—After briefly propounding the division of wealth left by the husband and wife, ("Let sons divide equally both the effects and the debts, after the demise, of their two parents,") the partition of a

Page.

man's goods has been described at large. The author, now intending to explain fully the distribution of a woman's property, begins by setting forth the nature of it. "What was given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition) is denominated a woman's property.

That, which was given by the father, by the mother, by the husband, or by a brother; and that, which was presented to the bride by the maternal uncles, and the rest (as paternal uncles, maternal aunts &c.,) at the times of wedding, before the nuptial fire; and a gift on a second marriage, or gratuity on account of 'supersession," and also property which she may have acquired by inheritance, purchase, partition, seizure or finding, or denominated by Menu and the rest 'woman's property.'(*a*).

The term 'woman's property' conforms, in its import, with its etymology, and is not technical: for, if the literal sense be admissible, a technical acceptation is improper.

The enumeration of six sorts of woman's property by Menu ("what was given before the nuptial fire, what presented in the bridal procession, what has been bestowed in token of affection or respect, and what has been received by her from her brother, her mother, or her father, are denominated the six-fold property of a woman") is intended, not as a restriction of a greater number, but as a denial of a less.

Definitions of presents given before the nuptial fire and so forth have been delivered by Catyayana: "What is given to women at the time of their marriage, near the nuptial fire, is celebrated by the wise as woman's property bestowed before the nuptial fire. That, again, which a woman receives while she is conducted from her father's house to her husband's dwelling is instanced as the property of a woman, under the name of gift presented in the bridal procession. Whatever has been given to her through affection by her mother-in-law, or her father-in-law, or has been offered to her as a token of respect is denominated an affectionate present. That, which is received by a married woman or by a maiden, in the house of her husband or of her father, from her brother or from her parents, is termed a kind gift."

Besides (the author says.) "That which has been given by her kindred; as well as her fee or gratuity, or anything bestowed after marriage." What is given to a damsel by her kindred; by the relations of her mother, or those of her father. The gratuity, for the

Page.

receipt of which a girl is given in marriage. What is bestowed or given after marriage, or subsequently to the nuptials.

It is said by Catyayana, "What has been received by a woman from the family of her husband at a time posterior to her marriage, is called a gift subsequent; and so is that, which is similary received from the family of her father." It is celebrated as woman's property: for this passage is connected with that which had gone before. 29 *a*

DAYABHAGA.—21. But in other description of property excepting these two, the woman has the sole power of gift, sale or other alienation. So Catyayana declares. "That which is received by a married woman or a maiden, in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred. The independence of women, who have received such gifts, is recoginsed in regard to that property; for it was given by their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale according to their pleasure, even in the case of immovables" (*a*)..... 24 *a*

Do. ..... 29 *a*

Do. ..... 29 *b*

SMRITI CHANDRIKA.—9. It is hence to be understood that property worth more than two thousand Karsha Panas is not to be allotted to a woman even by the wealthy, for the sake of her subsistence (*a*).

10. With reference to the amount of gift so fixed, it is to be gathered that the payment is to be made every year, and that to such payment alone, the rule in question is applicable. Where, however, a payment is made, once for all, to meet the charges of subsistence for several years, neither the restrictions of amount as above shown, nor the prohibition against gift of immoveable property applies..... 24 *a*

Do. ..... 29 *b*

SMRITI CHANDRIKA.—7. Both the foregoing passages tend to show that Saudayika is the wealth called "Yautaka" (1) or the like received by a woman from her own parents or persons connected with them in the house of either her father, or her husband, from the time of her betrothment to the completion of the ceremony to be performed on the occasion of her entering her lord's house.

12. From all the foregoing, it must be concluded that women possess independent power only over Saudayika (1) and over their husband's donation excepting immoveables, and that their power is not

Page.

independent over other sorts or property although they may be Stridhana (2)..... 24 *a*

Do. ..... 27 *b*

Do. ..... 28 *a*

Do. ..... 27 *a*

Do. ..... 28 *a*

MADHAVYA.—Catyayana explains the nature of that which is given at the procession and out of affection :—" What a woman who is being led from her fathers house gets, that is called Stridhana given during the procession ; whatever is given her out of affection by her mother or father-in-law, and in return for her respectful greeting, is called a gift of affection." C. " Given by relatives," (*i. e.*) what is given by the mother, father and relatives of the maiden. " Culka" (*i. e.*) that which is taken, and (then) the maiden is given away. " Presents made after marriage," (*i. e.*) that which is given after the marriage. As Catyayana has said:—" What is received as the price of utensils for the house, or cattle, or milch cows for personal ornaments or for work, that is called Culka. What is received by a woman after marriage from her husband's or from her parents family, that is called a present made after marriage." Catyayana has mentioned a peculiarity in regard to gifts of property made to women by their parents &c :—

" Stridhana up to the amount of two thousand (Karashapanas) except immoveable property should be given to a woman by her father, mother, husband, brother ; or relations according to their means." The meaning is, property not immoveable to the value of two thousand Karashapanas should be given. This rule is to be understood of a gift every year. But this is not a rule of limitation in the case of a payment made once for all on account of subsisitance for several years ; nor is there a prohibition regarding immoveable property (in that case.) Hence Saudayika property even if immovable, has been pronounced by him capable of being alienated at will :—" That obtained by a married woman from her husband, or by a maiden in the house of her father, from her brother, or parents is called Saudayika, women have independence in regard to their Saudayika property. Because this means of subsistence (Saudayika) is given by these persons to quiet them, the independence of woman in regard to selling or giving away Saudayika property has always been allowed, even if it be immoveable."

Nareda has mentioned a peculiarity in regard to immoveable property given by the husband :—" That which has been given to a woman by an affectionate husband, even after his death, she may consume as she likes or give it away, except immoveable property."

Page.

Catyayana says that what is given fraudulently, &c., by the father &c., is not Stridhana :—" What is given to her conditionally, either by her brother, father, or husband, or fraudulently, that is not Stridhana."

C. " Given conditionally" ; ornaments and the like, for the purpose of wearing them at a festival &c.

" Fraudulently," with intent to cheat. That is the meaning.

He also says that what is obtained by a woman by any art is not Stridhana.

" Over whatever is gained by arts, and what is given out of affection by others than her relations, her husband has dominion ; the rest is called Stridhana." " By other's" Viz. by a friend &c..... ..... 24 *a*

Do. ..... 25 *b*

Do. ..... 26 *a*

Do. ..... 27 *a*

Do. ..... 27 *b*

Do. ..... 28 *a*

Do. ..... 29 *b*

VYAVAHARA MAYUKHA.—8. Again, though Menu says: (3) " A woman should never make expenditure from the goods of her kindred (which are) common to (her and) many ; or even from the property of her lord without his assent." (Expenditure, is disbursement) yet, in some kinds of wealth, they are declared to possess sole property, by Catyayana (4) " That which is received by a married woman, or with a maiden, in the house of her husband, or of her father, from her brother or from her parents, is termed the gift of affectionate kindred (Saudayakam). The independence of woman, who have received such gifts, is recognised in regard to that property, for it was given by their kindred to soothe them, and for their maintenance." " The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale, according to their pleasure, even in the case of immoveables."

9. But over immoveable property given them by their husbands, they do not possess full power, from this text of Nareda (5) " What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away, excepting immoveable property." (*a*)..... 24 *a*

Do. ..... 27 *b*

Do. ..... 28 *a*

Do. ..... 29 *a*

Do. ..... 24 *b*

Do. ..... 27 *a*

Do. ..... 29 *b*

Page.

NAREDA.—Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or house..... 24 *b*

Do. ..... 27 *a*

Do. ..... 28 *c*

DAYABHAGA.—But in the cases of immoveables bestowed on her by her husband, a woman has no power of alienation, by gift or the like (*c.*) So Nareda declares:—

"What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away, excepting immoveable property." It follows from the specific mention of "given by a husband," that any other immoveable property, except such as has been given to her by him, may be aliened by her. Else (if this text forbid donation in the case of immoveables in general) the preceding passages concerning the power of women in respect of donation and of sale, "according to their pleasure, even in the case of immoveables," would be contradicted..... 24 *b*

Do. ..... 27 *a*

Do. ..... 29 *a*

Do. ..... 29 *b*

SMIRITI CHANDRICA.—The purport of the above passage is that a wife possesses no independent power over immoveable property given by her husband, even after his demise.

By the words "as she pleases" used in the above text of Nareda, the liberty of the woman over property other than immoveables is shewn..... 24 *b*

APASTAMBA.— Ornaments are the exclusive property of a wife, and so is wealth given to her by kinsmen or friends, according to some legislators..... 25 *a*

Do. ..... 28 *e*

DEVALA.— Food and vesture, ornaments, perquisites, and wealth received by a woman from a kinsman, are her own property: she may enjoy it herself; and her husband has no right to it except in extreme distress.

2. If he give it away on a false consideration, or consume it; he must repay the value to the woman, with interest; but he may use the property of his wife, to relieve a distressed son..... 25 *a*

Do. ..... 25 *d*

Do. ..... 28 *c*

Do. ..... 29 *c*

Page.

MENU.—Such ornamental apparels, as women wear during the lives of their husbands, the heirs of those husbands shall not divide among themselves: they who divide it among themselves, fall deep into sin..... 25 *a*

VYAVAHARA MAYUKHA.—The non-existence of absolute power, in husband's and the rest, over women's property, is declared by the same author. 6 "Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property, to take it or bestow it: If any of those persons by force consume the woman's property, he shall be compelled to make it good with interest, and shall also incur a fine. If such person, having obtained her consent, use the property amicably, he shall be required to pay the principal when he becomes rich." Menu: Such kinsman as (by any pretence) appropriate the fortunes of women during their lives, a just king must punish with the severity due to thieves: (2) "*Such ornamental apparel, as women wear during the life of their husbands, the heirs of the husband shall not divide among themselves: they who do so, are degraded from their tribe.*" *Wear, meaning, things worn by them, which have been given to them for the purpose by their husbands or the others. Devala:* (3) "*Her maintenance, ornaments, perquisite, and gain, are the separate property of a woman: she herself exclusively enjoys it, and her husband has no right to it unless in distress.*" (4) "If he let it go on a false consideration, or consume it he must repay the value to the woman with interest, but he may use the property of his wife, to relieve a distressed son." Maintenance, wealth given her by her father, or the others, for the purpose of subsistance. Gain, interest (or profit). To let go, get rid of and give away, have all the same meaning in this place. The word son is here used in its general sense for (any member of) the family. Yajnyawalkya (5) "A husband is not liable to make good the property of his wife, taken by him in a famine or for the performance of some religious duty or during illness, or while under restraint." Here, by using the word husband alone, it is virtually declared, that woman's private property must not be taken by any other but him, even when distressed by a famine or other calamity. Religious duties, such as are indispensable. Under restraint, in prison..... 25 *a*

Do. ..... 25 *d*

Do. ..... 25 *e*

Do. ..... 29 *c*

DAYABHAGA.—So Devala says, "Her subsistance, her ornaments, her perquisite, and her gains, are the separate property of a woman. She herself exclusively enjoys it; and her husband has no right to use it unless in distress"..... 25 *a*

Page.

DAYAKRAMA SANGRAHA.—So Devala says, "Her subsistance, her ornaments, her perquisite, and her gains, are the separate property of a woman. She herself exclusively enjoys it; and her husband has no right to use unless in distress." "Subsistence," food and raiment.... 25 *a*

SMRITI CHANDRIKA.—15 Hence Devala declares by the following passage that the husband is not competent even to use the Stridhana of his wife "Her subsistence (Vrtti), (1) her ornaments, her perquisite, and her gain (Labham) are the separate property of a woman. She herself exclusively enjoys it and her husband has no right to use it unless in distress. If he let it go in vain, or consume it, he must repay the value to the woman with interest." (Vrtti) Wealth given by the father or the like for subsistence. (Labham) (1) that which is gained is Labham (Labheyata Iti Labham). Under this definition, that which a woman receives on occasions of fastings &c., as an offering to gratify "Parvati" or other goddess, classes also as Stridhana.

The pronoun "herself" has been used after "she," in the above passage in order to show that the property is to be enjoyed by the woman even to the exclusion of her offspring. As for the exclusion of the husband, that has been expressly provided for by the sentence. "And her husband has no right to use it." The husband himself being excluded, the exclusion of the other relatives such as brother, or the like, is inferrible by the analogy of the loaf and staff. (2)

In vain. On occaions when there is no distress.

If he let it go. If he gives it away.

27 Therefore Menu: "Their kinsmen who take their goods in their life-time, a virtuous king should chastise by inflicting the punishment of theft. Such ornaments as are worn by women during the life of their husband, the heirs of the husband shall not divide among themselves: they who do so are degraded from their tribe." (2) 25 *a*

SMRITI CHANDRICA.—12. The objector says: A gift made by the father or the like does not become Stridhana or woman's property even where it is made unconditionably and without a fraudulent design; for, there is the text. "A wife, a son, and a slave are all incapable of property (Nirdhana): the wealth which they may earn is the wealth of the man to whom they belong."

13. Reply, this is not so. As the word "wife" has been used in the passage above quoted with the words "son &c," it must be understood that it is not thereby intended to declare a woman to be actually incapable of property (Nirdhana,) as, in that case, the incapability in question would also apply to a son, which is quite opposed to law. The passage is simply indicative of the want of inde-

Page.

pendent power of a woman to make expenditure or the like from the wealth. The spirit of the passage must hence be understood to be that a wife and others cannot make expenditure even of their separate property without the permission of him to whom they belong.

14. Menu, therefore says: "Women should never make expenditure (Nirharam) from the wealth of the family common to many, inclusive of themselves, or even from their separate property, without the permission of their respective lords."(1)

15. The meaning is that women who are naturally wanting in independence cannot, of their own choice, make disbursements, use, or the like of property belonging in common to themselves and their husbands or of property belonging to them exclusively.(1)

16. Or the passage "A wife, a son and a slave are all incapable of property (Nirdhana) &c.," (para 12) may be taken as relating to the wealth earned by a woman by mechanical arts or the like; for, in respect of such wealth, Catyayana says; "The wealth which is earned by mechanical arts, or which is received through affection from others, is always subject to her husband's dominion. The rest is pronounced to be the woman's property Stridhana."..... 25 *c*

Do. ..... 26 *c*.

YAJNYAWALKYA.—If a husband, in a famine, or for the performance of some indispensable duty, or during extreme illness, or while a creditor keeps him confined, should appropriate the wealth of his wife, he shall not, *while his distress lasts*, be compelled to restore it against his will..... 25 *d*

Do. ..... 29 *c*

MITACSHARA.—It has been declared, that the property of a woman leaving no issue, goes to her husband. The author now shows, that, in certain circumstances a husband is allowed to take his wife's goods in her life-time, and although she have issue: "A husband is not liable to make good the property of his wife taken by him in a famine or for the performance of a duty, or during illness, or while under restraint."

32. In a famine, for the preservation of the family, or at a time when a religious duty must indispensably be performed, or in illness, or "during restraint," or confinement in prison or under corporal penalties, the husband, being destitute of other funds and therefore taking his wife's property, is not liable to restore it. (b) But, if he seize it in any other manner (or under other circumstances) he must make it good..... 25 *d*

Do. ..... 29 *c*

Page.

SMRITI CHANDRICA.—By the sentence. "Her husband has no right to use it *unless in distress*" in the above passage of Devala, it would appear that, in time of distress, the husband alone is competent to use the woman's property, and none else.

18. Therefore, in the subsequent text of the same author. "Or the property of a woman may be used to relieve a distressed son," the words "by the husband" must be understood after the words "may be used." The term "son" has been used to denote any number of the family. The distress referred to must be of such a character as it is impossible to get rid of, except with the use of Stridhana.

To relieve, To save. By the particle "Va" (or) being used in the above passage it must be understood that, on other occasions also of extreme distress incapable of being obviated except with the use of Stridhana, the husband is competent to use or give it away though he may not have obtained the permission of his wife for the same.

20. The reply is that even should the permission of the owner be wanting where the owner is one (as a wife) subject to the control of the party requiring the Stridhana, although he is not competent to alienate the property at will, yet his competency to r[illegible] or consume it with the view of g[illegible]ting rid of a distress has been [illegible]pressly sanctioned by the passage above quoted. Hence, there is no illegality in the matter..... 25 *d*

MADHAVYA.—Yajnyawalkya has said that in some cases a husband may take the property of his wife though she be alive and have children:—"The husband need not (against his will) restore to his wife Stridhana taken during a famine or for religious purposes, or in sickness or in confinement" C. "In confinement;" in prison &c. If he takes the property, having no wealth of his own, he should not restore it to her, but he should restore what he has taken in any other way; so Catyayana says:—"Neither the husband, nor the son, nor the father, nor the brother, have any authority over Stridhana, to receive or make away with it. If any of them consumes forcibly the Stridhana he should be made to return it with interest, and should also be fined. Even if permitted through friendship he consumes it, if he be rich, he should be forced to restore the capital." Devala also says:—"Means of subsistence, ornaments, çulca, and gain are all called Stridhana. She may consume them as she pleases; the husband, except in distress, cannot touch (such property). He should return it with interest to his wife if he makes away with it or gives it away. 25 *d*

Do. ..... 25 *e*

Do. ..... 28 *c*

Do. ..... 29 *c*

Page.

DAYABHAGA.—However, if the husband have no means of subsistence, without using his wife's separate property, in a famine or other distress, he may take it in such circumstances: but not in any other case. (*d*) So Yajnyawalkya declares; "A husband is not liable to make good the property of his wife, taken by him in a famine, or for the performance of a duty, or during illness, or while under restraint." Catyayana, again, denies the right of the husband to do so in any other circumstance: "Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property to take it or to bestow it. If any one of these persons by force consume the woman's property, he shall be compelled to make it good with interest, and shall also incur a fine. If such person, having obtained her consent, use the property amicably, he shall be required to pay the principal, when he becomes rich. But if the husband have a second wife and do not show honor to his first wife, he shall be compelled by force to restore her property, though amicably lent to him. If food, raiment and dwelling be withheld from the woman, she may exact her due supply, and take a share (of the estate) with the co-heirs." ..... 25 *d*

Do. ..... 26 *a*

Do. ..... 29 *c*

DAYACRAMA SANGRAHA.—33. But the husband is at liberty during a period of famine and the like when unable to subsist without the use of the woman's separate property, to take such property even though it be the gift of affectionate kindred. Thus Yajnyawalkya "A husband is not liable to make good the property of his wife taken by him in a famine, or for the performance of a duty, or during illness, or while under restraint.

21. "From the family of her kindred;" Here by the word "kindred," her father and mother are (also) intended..... 25 *d*

VYAVAHARA MAYUKHA.—11. In some cases a husband, though unwilling, may be forced to restore it; for, says Devala: (6) "But if the husband have a second wife, and do not show honor to his first wife, he shall be compelled by force to restore her property, though amicably lent to him. If suitable food, raiment, and dwelling, be withheld from the woman, she may exact her own (property) and take a share (of the estate) with the co-heirs." That is, at their hands..... 25 *e*

SMRITI CHANDRICA.—11. As for the husband and the like, they possess no independent power over any sort of Stridhana, for, Kàtyàyana says:—"Neither the husband, nor the son, nor the father, nor the brothers can assume the power over a woman's property to take it or bestow it." This is because the husband and others possess no ownership over such property. Hence the same author continues:—

Page.

"If any one of these persons by force consumed the woman's property, he shall be compelled to make it good with interest and shall also incur a fine. If such person having obtained her consent, used the property amicably, he shall be required to pay the principal, when he becomes rich." Where she has no dower (*i. e.*) her own separate property. (1 *b*)..... 25 *e*

DAYAKRAMA SANGRAHA.—Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property to take it or to bestow it. If any one of those persons by force consume the woman's property, he shall be compelled to make it good with interest and shall also incur a fine. If such person having obtained her consent, use the property amicably, he shall be required to pay merely the principal when he becomes rich. But if the husband have a second wife, and do not shew honor to his first wife, he shall be compelled by force to restore her property, though amicably lent to him. If food, raiment and dewelling be withheld from the woman, she may exact her due supply, and take a share (of the estate) with the co-heirs..... 26 *a*

MENU.—Three persons, a wife, a son, and a slave are declared by law to have *in general* no wealth exclusively their own, the wealth, which they may earn, is *regularly* acquired for the man to whom they belong..... 26 *a*

VYAVAHARA MAYUKHA.—In what they have earned by the arts, or obtained from friends or those distinct from parents or the rest, women have no property; for thus says the same author! (1) "The wealth, which is earned by mechanical arts, or which is received through affection from any other (but the kindred) is always subject to her husband's dominion. The rest is pronounced to be the woman's property." However though a text (2) says: "A wife, a son, and a slave, are (in general) incapable of property (Nirdhana): the wealth which they may earn, is (regularly) acquired for the man to whom they belong," it also relates (only) to wealth earned by mechanical arts and the like. It is moreover agreeable to reason, to refer this also to their not having absolute dominion in wealth received on their supersession (Adhivedanika) and the rest..... 26 *a*

Do. ..... 27 *b*

Do. ..... 28 *a*

DAYABHAGA.—Over that, which has been received by her "from any other" but the family of her father, mother, or husband, or has been earned by her in the practice of a mechanical arts (as spinning or weaving (*a*), her husband has dominion and full control. He has a right to take it, even though no distress exist. Hence though the goods be

Page.

her's they do not constitute woman's property; because she has not independent power over them..... 26 *a*

Do. ..... 28 *a*

DAYAKRAMA SANGRAHA.—The wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred) is always subject to the husband's dominion. The rest is pronounced to be the woman's property..... 27 *a*

Do. ..... 28 *a*

MITAKSHARA.—So the text concerning an affectionate gift "(What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away excepting immoveable property;" (*a*) would be (pertinent), if property were vested by birth alone. Nor is it right to connect the words "excepting immoveable property" with the terms "what has been given" (in the text last cited,) for that would be a forced construction by connexion of disjoined terms..... 27 *a*

But the text of Vishnu (§ 20) which mentions a gift of immoveables bestowed through affection, must be interpreted as relating to property acquired by the father himself and given with the consent of his son and the rest: for, by the passages (above cited, as well as others not quoted viz.) "The father is the master of the gems, pearls, &c." (§ 21), the fitness of any other but immoveables for an affectionate gift was certain.

DAYAKRAMA SANGRAHA.—31. "Even in the case of immoveables," relates to immoveable property other than that which has been bestowed upon her by her husband, for a prohibition exists against the gift, or sale by a woman in regard to immoveable property, given to her by her husband; So Nareda, "What has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or may give it away, excepting immoveable property."

32. Since, "given by her husband" is here particularly specified, the general text of Catyayana above quoted, must be considered applicable to immoveable property, other than bestowed by a husband, in conformity with the principle which admits of a special provision limitting the operation of a general rule..... 27 *a*

Do. ..... 29 *a*

CATYAYANA.—Vide Verse 475 in Page 24..... 27 *b*

477. What a woman has received as a gift from her husband, she may dispose of at pleasure after his death if it be moveable; but as long as he lives let her preserve it with frugality, or she may commit it to his family.

Page.

2. The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritiual parents, may frugally enjoy the estate until she die; after her, the legal heirs shall take it..... 27 *b*

Do. ..... 28 *a*

Do. ..... 28 *c*

Do. ..... 28 *e*

DAYABHAGA.—21. But in other descriptions of property excepting these two, the woman has the sole power of gift, sale or other alienation. So Kàtyáyana declares: "That which is received by a married "woman or a maiden, in the house of her husband or of her father, "from her husband or from her parents, is termed the gift of affec- "tionate kindred. The independence of women, who have received "such gifts, is recognised in regard to that property; for it was given "by their kindred to soothe them, and for their maintenance. The "power of women over the gifts of their affectionate kindred is ever "celebrated, both in respect of donation and of sale according to their "pleasure even in the case of immoveables."

22. What is obtained from kindred relations (meaning persons of her father's family or her mother's,) is the gift of affectionate kindred. 27 *b*

DAYAKRAMA SANGRAHA.—That which is received by a married woman, or maiden in the house of her husband or of her father, from her parents, is termed the, "gift of affectionate kindred." The independence of women who have received such gifts is recognised in regard to that property, for it was given by their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale according to their pleasure, even in the case of immoveables..... 27 *a*

Do. ..... 28 *a*

Do. ..... 29 *a*

Do. ..... 29 *b*

MENU.—A woman should never make a hoard from the goods of her kindred, which are common to her and many; or even from the property of her lord without his assent..... 28 *a*

CATYAYANA.—But whatever wealth she may gain by arts, as by painting or spinning, or may receive on account of friendship from any but the kindred of her husband or parents, her lord alone has dominion over it: of her other property she may dispose without first obtaining his assent..... 28 *a*

VYASA.—A portion amounting to two in the thousand out of the whole estate should be given to a woman; that, and whatever wealth is bestowed on her by her husband, she may use as she pleases..... 28 *a*

Page.

YAJNYAWALKYA.—501. A married woman dying without issue, her property received at Brahma nuptials, or even in other four unblameable forms of marriage, it goes to her husband; if she leave issue, it descends to her daughters; but, in other forms of the nuptial ceremony, her property then received goes to her father and mother..... 28 *b*

Do. ..... 30 *d*

MENU.—502. It is ordained, that the property of a woman married by the ceremonies called Brahma, Daiva, Arsha, Gandharva, and Prajapati, shall go to the husband, if she die without issue..... 28 *b*

Do. ..... 30 *d*

MENU.—503. But her wealth given on the marriage called Asura, or on either of the two others, is ordained, on her death without issue, to become the property of her father and mother..... 28 *b*

NAREDA.—504. The property of married women shall descend to their children, and legislators ordain, that, if women leave no issue, their property received at the marriage called Brahma, or other four unblamed nuptials, shall go to their husbands; received at other marriage, it goes to their parents..... 28 *b*

Do. ..... 30 *d*

DAYABHAGA.—"The separate property of a childless woman married in the form denominated Brahma, or in any of the four (unblamed forms of marriage,) goes to her husband..... 28 *b*

DAYAKRAMA SANGRAHA.—In default of all the above heirs, if the property were obtained by the woman at the time of nuptials celebrated according to one of the forms denominated Brahma, Daiva, Arsha, Gandharva, or Prajapati, her husband is the next successor, for the text of Menu declares, it is ordained that the property of a woman married by the ceremonies called Brahma, Daiva, Arsha, Gandharva, or Prajapati, shall go to her husband, if she die without issue..... 28 *b*

MITAKSHARA.—The kinsmen have been declared generally to be competent to succeed to a woman's property. The author now distinguishes different heirs according to the diversity of the marriage ceremonies. "The property of a childless woman, married in the form denominated Brahma, or in any of the four (unblamed modes of marriage,) goes to her husband: but if she leave progeny, it will go to her (daughter's) daughters, and in other forms of marriage (as the Asura &c.,) it goes to her father and mother, on failure of her own issue..... 28 *b*

VYAVAHARA MAYUKHA.—The same author expounds the succession of kindred (Bandhava) to be according to the different kinds of marriage. (3) "The property of a childless woman married in the form denominated Brahma or in any of the other four (unblamed modes of marriage)

Page.

goes to her husband: but if she leave progeny, it will go to her daughters; and in other forms of marriage (as the Asura &c.) it goes to her father, and mother, on failure of her own issue." (in the one case,) if there be no husband, then the nearest to her in his (tat) own family takes it; and (in the other case), if her father do not exist, the nearest to her in (her) father's family succeeds (for the law that,) "To the nearest sapinda, the inheritance next belongs" as declared by Menu (4) denotes, that the right of inheriting her wealth, is derived even from nearness of kin to the deceased (female)under discussion and, though the Mitakshara (5 holds, "that on failure of the husband, it goes to his (tat) nearest kinsmen (Sapinda) allied by funeral oblations;" and, 'on failure of the father, then to his (tat) nearest sapindas;' yet, from the context it may be demonstrated, that her nearest relations are his nearest relations; and (the pronoun tat being used in the common gender,) it allows of our expounding the passage 'those nearest to him, through her, in his own family;' for the expressions are of similar import..... 28 *b*

SMRITI CHANDRIKA.—Where a wife leaves no progeny, her wealth goes to her husband; it being declared by Yajnyawalkya, "The property of a childless woman (married) in the form denominated Brahama or even in any of the four unblamed modes of marriage goes to her husband" (1) By the use of the particle Api "even" in the above text, the marriage of the form of "Gandharva" is alo included..... 28 *b*

MADHAVYA.— In default of grandsons, the husband &c. inherit. Menu mentions a peculiarity in this case according to the kind of marriage by which the deceased wife was espoused:—"It is ruled that the property of a woman who dies without issue shall go to the husband if she was married by the Brahma, Daiva, Arsha, Gandharva, or Prajhapati, forms of marriage. But whatever was given on an Asura marriage &c. if she dies without issue, it is ordered, shall go to her father and mother." The meaning is, the wealth that belongs to a woman married by the Brahma, Daiva, Arsha, Gandharva, and Prajapatya rites in default of issue to inherit viz. from daughters down to grandsons, goes to her husband; and not to her mother &c. But of a woman married by the Asura, Rakshasa, and Paicacha forms of marriage the wealth goes to the father and mother. As for the text of Catyayana, "what has been given by the relatives; in default of relatives, belongs to the husband," it refers to the property of a woman married by the Asura &c. forms of marriage. So he also says:—"The paternal wealth of a woman received at an Asura or the like marriage, in default of her children belongs to (her) father and mother..... 28 *b*

CATYAYANA.—Yet more; if he have taken a second wife, and no longer give his first wife the honor due to her, the king shall compel him,

Page.

even by violence, to restore her property, though it was put amicably into his hands.

2. If suitable food, apparel, and habitation, cease to be provided for a wife, she may by force take her own property, and a just allotment for such a provision; or she may, if he die, take it from his heir.

3. This is a law of Lichita; but after receiving her own property and just allotment, she must reside with the family of her husband; yet, if afflicted by disease, and in danger of her life, she may go to her own kindred..... 28 *c*

SMRITI CHANDRIKA.— Although this passage from being placed in the Smriti of Catyayana next to the three Stanzas. "Neither the husband nor the son &c. para 13," would lead to the supposition that it is applicable to the husband and others also, yet a consideration of the texts following the passage, shows that the pasage in question is applicable to the husband alone. The texts are, "But if the husband have a second wife, and do not show honor to his first wife, he shall be compelled by force to restore the property, though amicably lent to him. If suitable food, raiment, and dwelling be withheld from the woman, she may exact her own (property)" (1 *a*).... 28 *c*

SMRITI CHANDRICA.—3. Catyayana, too, on the subject: —"The independence of women who have received the gifts termed "Saudayika" is recognised in regard to that property, for, it was given to soothe them, and for their maintenance. The power of women over "Saudayika" is ever celebrated, both in respect of donation and of sale according to their pleasure, even in the case of immoveables.(1) Let the woman place her husband's donation as she pleases, when he is deceased; but while he lives, she should carefully preserve it."(2)

4. By the use of the word "ever" in the second of the above texts, it is understood that a woman possesses independent power over the Stridhana termed Saudayika even during the life-time of her husband. In regard, however, to the husband's donation, that is, what was given by the husband, she is declared by the three quarters of the Cloka immediately following the second text above noticed, to acquire independent right, only after the demise of her husband. But while he lives, she is incompetent to dispose of what was given to her by him without his permission. She is only bound to preserve it; it being declared at the conclusion of the above passages that. She should carefully preserve it."

DAYABHAGA. 1 to 4 & 21.

1. In the next place, for the purpose of teaching the distribution of a woman's separate goods, such property is first described. On this subject Vishnu says, "what has been given to a woman by her father, her mother, her son, or her brother, what

Page.

has been received by her before the nuptial fire, what has been presented to her on her husband's espousal of another wife, what has been given to her by kindred, as well as her perquisite, and a gift subsequent are a woman's separate property."

2.—Catyayana defines a gift subsequent. "What has been received by a woman from the family of her husband at a time posterior to her marriage, is called a gift subsequent, and so is that which is similarly received from the family of her kindred. Whatever is received by a woman after her nuptials, either from her husband or from her parents through the affection of the giver Bhrgu pronounces to be a gift subsequent."

3. By the word, "kindred" her father and mother are denoted. Hence the meaning is this: any thing received subsequently to the marriage, from (maternal or paternal uncles or other) persons who are related through the father or the mother, or from those two parents themselves, or so received from the husband, or from his family, namely, her father-in-law and the rest, is a gift subsequent. But the term 'kindred,' in the text of Vishnu, intends maternal uncles and others for the father and the rest are specified by the appropriate terms: either the husband, or the parents, inherit that which was received at the time of the nuptials, according to the difference between marriages denominated Brahma, &c. and those called Asura and so forth.

4. Menua nd Catyayana describe the separate property of a woman. "What was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the woman through affection, and what has been received by her from her brother, her mother, or her father, are denominated the six-fold property of a woman." So Nareda says: "What was given before the nuptial fire what was presented in the bridal procession, her husband's donation and what has been given by her brother or by either of her parents, is termed the six-fold property of a woman..... 29 *a*

DAYABHAGA.—c. 4. s. 3. 12.

12. That is confirmed by Viddha Catyayana, who says, "Immoveable property, which has been given by parents to their daughter, goes always to her brother, if she die without issue." For it appears, that the brother's right of succession is founded simply on her leaving no issue (which is the case equally of a maiden, as of a childless wife.)..... 29 *b*

VYAVAHARA MAYUKHA.—On the subject of giving property to women, Catyayana further declares: "Separate property, excepting immoveables, is to be given to women by their father, mother, husband, brother, and kindred, according to their means, as far as two thousand." The wealth to be given excludes immoveable property, and

Page.

must not exceed two thousand panas, according to Madana. So Vyasa: "A present, amounting to two thousand (panas)" at the most, may be given to a woman, out of the wealth." And this sum, of two thousand (panas) at the outside, is to be given every year, so that in a period of many years, more would by this (means be given.) If they are able, even immoveable property may be given; according to the same, (Madana.)..... 29 *b*

SMRITI CHANDRIKA.—13. to 21.

13. As for the husband and the like, they possess no independent power over any sort of Stridhana, for, Catyayana says:—"Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property to take it or bestow it." This is because the husband and others possess no ownership over such property. Hence the same author continues:—"If any one of these persons by force consumed the woman's property, he shall be compelled to make it good with interest and shall also incur a fine. If such person having obtained her consent, used the property amicably, he shall be required to pay to the principal, when he becomes rich."

14. From its being mentioned that the principal is payable when he becomes rich, it is inferrible that the payment of even the principal is not necessary in the case of a poor man. It also appears from re-payment of the principal being enjoined even where Stridhana is used with permission, that the husband and the like are wanting not only in independent power, but also in ownership over Stridhana. It must hence be understood that in a husband's property, the wife, by reason of her marriage, possesses always ownership, though not of an independent character, but that the husband does not possess even such ownership in his wife's property.

15. Entered in 25.

16. The above passage of Devala is applicable to a case where a husband gives away or consumes his wife's Stridhana without her (wife's) permission but without force. This is inferrible from the circumstances that no injunction of penalty, such as fine, is annexed to the direction contained in the passage that the value of the property must be re-paid to the woman with interest.

17 and 18. Entered in 25.

19. The objector here asks how could competency be declared in a man to use or give away another's property without the permission of such other person.

20. Entered in 25.

21. Yajnyawalkya on the subject:—"A husband is not liable to make good the property of his wife taken by him in a famine or for

Page.

the performance of a duty or during illness or while under restraint."

For the performance of a duty, whether the duty be performable daily or occasionally. The particle " cha" used in the text tends to show that the duty contemplated refers also to a temporal duty (Kamiem) and, in some instances, to expiatory ceremonies, such as " Graha Yajna" or the like. While under restraint, while under the coercion of creditors or the like, which it is impossible to get rid of without payment of money. (Taken by him) Taken by him under circumstances leaving no alternative. After the sentence " A husband is not liabe to make good," and the words " where he has no means to repay the amount, as in the case of poverty." When he acquires means, it is necessary that he should re-pay what he has taken out of the Stridhana..... 29 *c*

MITACSHARA.—9. and 10.

9. If a woman die " without issue," that is, leaving no progeny; in other words, having no daughter nor daugther's daughter, nor daughter's son, nor son, nor son's son; the woman's property, as above described, shall be taken by her kinsmen; namely her husband and the rest, as will be (forthwith) explained.

10. Entered in 28. (*b*)..... 30 *a*

Do. ..... 30 *c*

MADHAVYA.—In the case of a woman, deceased, who leaves neither daughters, daughter's daughters, daughter's sons, sons, or son's sons, than her bandhavas, her brother &c., take this Stridhana. The order of succession is as follows: On the decease of the mother the daughter takes first; so he has said:—" The daughters take what remains of their mother's (property) after debts are paid, and in their default, the issue." Gantama (says): " Stridhana (belongs) to daughters unmarried or without wealth." In default of daughters, daughter's daughters take, by the text of Yajnyawalkya:—" If there be offspring of the daughters." The shares are according to the mothers, where there are uneven numbers of daughters by different mothers. 30 *a*

MITACSHARA.—8 and 9.

8. A woman's property has been thus described. The author next propounds the distribution of it: " Her kinsmen take it, if she die without issue.

9. Entered in 30. *a*..... 30 *b*

MITACSHARA.—13. Hence, if the mother be dead, daughters take her property in the first instance: and here, in the case of competition between married and maiden daughters, the unmarried take the succession; but, on failure of them, the married daughters: and here again, in the case of competition between such as are provided and those who are unendowed, the unendowed take the succession first; but, on failure of them, those who are endowed. Thus Gautama

Page.

says. : " A woman's property goes to her daughters unmarried, or unprovided ;" ' or provided,' as is implied by the conjunctive particle in the text. " Unprovided" are such as are destitute of wealth or without issue..... 30 *c*

Do. ..... 30 *j*
Do. ..... 30 *k*

DAYABHAGA, 3—The four forms of marriage, at the head of which is that called Brahma, are here intended. Those four are the Daiva, Arsha, Prajapati, and Gandharva, with the Brahma, they make five. For Menu has specified five : namely " the ceremonies called Brahma, Daiva, Arsha, Gandharva and Prajapati." Wealth, which has been received by a woman while her marriage in any of those forms is celebrated, devolves on her husband, if she die without issue. Here issue signifies progeny..... 30 *d*

DAYABHAGA.—5. Therefore the observation of Vievarupa, that the text relates to woman's property received at the time of the nuptials, should be respected..... 30 *d*

DAYABHAGA.—6. But a woman's property, received at a marriage in the form called Asura and the like, her mother may take on her demise, though her husband be living ; and, on failure of the mother, the father. For that order of succession results from the text, " Her wealth is ordained to become the property of her mother and of her father." § § If then joint succession were intended, the author would have said, " become the propery of her two parents." And, as the father's right of inheritance is declared to be on failure of the mother in the case of a maiden's property, the same is fitting in this instance also..... 30 *d*

DAYABHAGA.—10. But wealth received by a woman after her marriage from the family of her father, of her mother, or of her husband, goes to her brothers (not to her husband) ; as Yajnyawalkya declares : " That which has been given to her by her kindred, as well as her fee or gratuity, and any thing bestowed after marriage, her kinsmen take, if she die without issue."..... 30 *d*

MITACSHARA.—10 and 11.

10. Entered in 28.

11. Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha, and Prajapati, the (whole) property, as before discribed, belongs in the first place to her husband. On failure of him, it goes to his nearest kinsmen *(a)* (sapindas) allied by funeral oblations. But, in the othir forms of marriage called Asura, Gandharva, Racshasa and Paicacha ; the property of a childless woman goes to her parents, that is, to her father and mother.

Page.

The succession devolves first (and the reason has been before explained,) on the mother, who is virtually exhibited (first) in the elliptical phrase pitrigami implying 'goes (gachhati) to both parents (Pitarau); that is, to the mother and to the father." On failure of them, their next kin take the succession..... 30 *d*

Do. ..... 30 *g*

VYAVAHARA MAYUKA.—28 and 29.

28. Entered in 28.

29. In the Brahama or in any of the other four, relates to the Brahmanical class, on account of these (rites) being the only ones lawful in respect to them. But as the Gandharva rite, is also lawful to the Kshatrya class and the rest, so also, the wealth of her who has been married according to that form devolves to her husband alone. And so Menu: "It is ordained, that the property of a woman, married by the ceremonies called Brahama, Daiva, Arsha, Gandharva, or Prajapati, shall go to her husband, if she die without issue." "But her wealth, given on the marriage called Asura, or on either of the two others Paicacha and Racshasa is ordained, on her death without issue, to become the property of her mother and her father..... 30 *d*

SMRITI CHANDRIKA.—27, 30 and 32.

27. Entered in 28.

30. The text of Catyayana,—"What was given by kinsmen goes in default of the kinsmen to her husband," refers to the property of a woman married in any but the five forms of marriage above described; for, the same author has accordingly declared:—"What is received from parents by a woman married in the form called "Asura" and the like, (1) goes, in default of her issue, to her mother and father.

(Received from parents) Received from mother or father, as a present. (In default of her issue,) In default of the issue of the woman married in the form Asura or the like. The word "issue" denotes the whole range of heirs from daughter's son to son's son, who have been declared above as capable of inheriting Stridhana.

32. In like manner, it must also be understood that Stridhana or property given to a woman married in the form of "Asura" or the like, by her paternal uncle, brother, maternal uncle, and other similar relations, reverts, after her demise, to such relations, where they survive her, and that failing them, it goes to her husband, Gautama, however, as an exception to this rule, says that a certain kind of donation made by relations does not go back to the donors. "The sister's perquisite (çulka) belongs to the uterine brothers; after them, it goes to the mother." (1)..... 30 *d*

Page.

MITACSHARA:—9 and 12.

9. Entered in 30 (*a.*)

12. In all forms of marriage, if the woman "leave progeny;" that is, if she have issue; her property devolves on her daughters. In this place, by the term "daughters," grand-daughters are signified; for the immediate female descendants are expressly mentioned in a preceding passage; "the daughters share the residue of their mother's property, after payment of her debts..... 30 *e*

DAYABHAGA.—By the pronoun in the phrase "sons of those persons" (§ 31) the woman's own issue and the child of a rival wife are signified. Therefore, their sons have a right to inherit; not the son of a daughter's son also, for he is excluded from the oblation of food at obsequies.... 30 *f*

SMRITI CHANDRIKA.—Likewise, the issue of a rival wife take the property of the step-mother, where the latter leaves no progeny, husband, or the like..... 30 *f*

DAYACRAMA SANGRAHA.—In default of the great grand-son in the male line, the son of a rival wife succeeds, for the text of Virhaspati recites that, "The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother are declared similar to mothers." "If they leave no issue of their bodies, nor son (of a rival wife,) nor duaghter's son, nor son of those persons, the sister's son and the rest, shall take their property." 30 *f*

DAYABHAGA.—37. This then is the order of succession, according to the various degree (of benefit to the owner of the property) from the oblation of food at obsequies. In the first place the husband's younger brother is entitled to the woman's property; for he is a kinsman (Sapinda) and presents oblations to her to her husband, and to three persons to whom oblations were to be offered by her husband. After him, the son either of her husband's elder or of his younger brother, is heir to the separate property of his uncle's wife; for he is a kinsman, and presents oblations to her, to her husband, and to two persons to whom oblations were to be offered by her husband.

On failure of such, the sister's son, though he be not a kinsman (Sapinda,) inherits the separate property left by his mother's sister, because he presents oblations to her, and to three persons, (her father and the rest,) to whom oblations would have been offered by her son. In default of him, the son of her husband's sister (for it is reasonable, since the husband has a weaker claim than the son, that persons claiming under them should have simliar relative precedence; is heir to the property of his uncle's wife; because he presents oblations to three persons to whom they were to be offered by her husband, also presents oblations to her and to her husband. On failure of him, the brother's son is the successor to his aunt's property, for he presents oblations to the father, to her grandfather, and to

Page.

herself. If there be no nephew, the husband of her daughter is heir to his mother-in-law's property, since he presents oblations to his mother-in-law and father-in-law..... 30 *g*

DAYABHAGA.—39. Again, on failure of these six, it must be understood, that the succession devolves on the father-in-law, the husband's eldest brother and the rest, according to their nearness of kin (the nearest sapinda being the heir.)..... 30 *g*

DAYACRAMA SANGRAHA.—3 & 4.

3. Therefore the husband's younger brother is first entitled to the succession, because he presents oblations to the woman, to her husband, and to three persons to whom her husband was bound to offer oblations and he is moreover a "sapinda."..... 30 *g*

DAYACRAMA SANGRAHA.—4. In his default, the succession devolves at once upon the sons of the husband's younger and elder brother, because they present oblations to the woman, to her husband, and to two persons to whom her husband was bound to offer oblations, (namely to his father and grand-father) and they are moreover within the degree of relationship, termed "Sapinda."..... 30 *g*

Do. ..... 3 *h*

DAYABAGA.—First the woman's property goes to her unaffianced daughter. If there be none such, it devolves on those who are betrothed. In their default, it passes to the married daughters (as indicated by the conjunctive particle in the text.) For the right of the female issue generally is suggested by the term "daughters" (in Gautama's text § 13); and the special mention of "unaffianced" and "unmarried", which follows, is pertinent as declaratory of the order of succession (and not as a limitation of the preceding general terms §)..... 30 *i*

Do. ..... 30 *k*

VYAVAHARA MAYUKHA.—18. In respect to woman's property, before enumerated in the texts of other sages, distinct from that acquired subsequent to marriage (Auvadheya) or through their husband's affection (Pritidatta), these distinctions are declared by Gautama. (4) "A woman's property goes to her daughters, unmarried or unprovided." *Unprovided*, such as are destitute of wealth..... 30 *j*

DAYABHAGA.—9. & 23.

But for the cause above stated, the son and maiden daughter have a like right of succession. On failure of either of them, the goods belong to the other. On failure of both of them, the succession devolves, with equal rights, on the married daughter who has a son, and on her who may have male issue. For, by means of their sons, they may present oblations at solemn obsequies..... 30 *k*

MENU.—The ample support of those who are entitled to maintenance, is rewarded with Bliss in heaven: but hell is the portion of that man

Page.

whose family is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care..... 31 *a*

MENU.—'When he wishes to relieve his natural parents or spiritual father, his wife or others, whom he is bound to maintain, or when he is preparing to honor deities or guests, he may receive gifts from any person, but must not gratify himself with such presents..... 31 *a*

Do. ..... 48 *a*

MENU.—Should a man have business abroad, let him assure a fit maintenance to his wife, and them reside for a time in a foreign country; since a wife, even though virtuous, may be tempted to act amiss, if she be distressed by want of subsistence..... 31 *a*

MENU.—A wife, given by the gods, who are named in the bridal texts, let the husband receive and support constantly, if she be virtuous, though he married her not from inclination; such conduct will please the gods..... 31 *a*

MENU.—Where female relations are made miserable, the family of him who makes them so, very soon wholly perishes; but, where they are not unhappy, the family always increases..... 31 *a*

MENU.—On whatever houses the women of a family, not being duly honored, pronounce an imprecation, those houses, with all that belong to them, utterly perish, as if distroyed by a sacrifice for the death of an enemy..... 31 *a*

MENU.—Let those women, therefore, be continually supplied with ornaments, apparel and food, at festivals and at jubilees, by men desirous of wealth..... 31 *a*

NAREDA.—Among brethren, if any one die naturally or civilly, and leave no issue, the rest may divide his property among themselves, excepting the whalth of his wives.

2. And shall support them until they die, provided they preserve unsullied the bed of their husband: but from other widows the heirs may resume their exclusive property..... 31 *a*

Do. ..... 37 *d*

Do. ..... 38 *d*

YAJNYAWALCYA.—Their daughters must be supported so long as they be not disposed of in marriage.

2. And their childless wives who preserve chastity, must be supplied with food and apparel; but disloyal and traitorous wives shall be banished from the habitation..... 31 *a*

Do. ..... 32 *b*

Do. ..... 37 *b*

Page.

YAJNYAWALCYA.—But a superseded wife must be maintained ; else a great offence is committed..... 31 *a*

DAYABAGA.—Sincet he grand-father is here mentioned, the text must relate to his effects. By again saying "all" after specifying "gems, pearls, &c." it is shown that the father has authority to make a gift or any similar disposition of all effects, other than land, &c. but not of immoveable, a corrody and chattels (i e slaves). Since here also it is said, "the whole," this prohibition forbids the gift or other alienation of the whole, because (immoveable and similar possessions are) means of supporting the family. For the maintenance of the family is an indispensable obligation ; as Menu positively declares. "The support of the persons who should be maintained is the approved means of attaining heaven. But hell is the man's portion if they suffer. Therefore (let a master of a family) carefully maintain them... 31 *a*

Do. ..... 33 *a*

DAYABHAGA.—Accordingly Canakha and Likhita say, "Since the family is supported on the inheritance, sons are not independent : but as it were under the authority of a father, so long as the mother lives." They are not independent of their mother ; they are not competent to make a partition..... 31 *a*

DAYABHAGA.—If the husband, having taken the property of his wife, live with another wife and neglect her, he shall be compelled to restore the property taken by him. If he do not give her food, raiment, and the like, that also may be exacted from him by the woman..... 31 *a*

SMRITI CHANDRIKA.—15.

By the qualifying terms "if she be dowerless "made use of in the text, para 12, it is inferrible that where a mother, by means of her own separate property, is able to maintain herself and perform such religious duties (requiring for their accomplishment the use of wealth) as are observable by her, she can take no share out of her husband's property. If the separate property of a mother be insufficient for the above purposes, then she, notwithstanding her possession of such property, is to take a share, which, however, is not to be equal to that of a son, but less than that proportionate to her wants..... 31 *a*

SMRITI CHANDRIKA. 16. Accordingly, where the estate forming the subject of partition is large, the mother, though destitute of separate property, is not to take an equal share, but such an inferior share as may be sufficient to meet her own wants. The condition imposed by the expression. "If she be dowerless" shows that the taking of a share by the mother is on account of her necessity and not in right of inheritance as is the case with brothers..... 31 *a*

Do. ..... 48 *a*

Page.

SMRITI CHANDRIKA. 17. By a mother taking not a fixed share but only so much as she stands in need of, the word "equal" used in the text, para 12, is not rendered useless, for, the word serves to debar her, where the partible estate is small, from claiming more than the share of a son, on the score of its being needed by her. ..... 31 *a*

Do. ..... 34 *b*
Do. ..... 48 *a*

SMRITI CHANDRIKA. When the father-in-law and the like are qualified to maintain the widow and take themselves the property of the deceased undivided member of the family, they alone are to maintain the widow from the property so taken. Accordingly. Nareda: "Whichever wife (patni) becomes a widow and continues virtuous, she is entitled to be provided with food and raiment by the elder brother of the deceased or by her father-in-law or by a 'Gotraja' (a member born in the same family) or any other person."

In order to maintain the widow, the elder brother, or any of the others above mentioned, must have taken the property of the deceased; the duty of maintaining the widow being dependent on taking the property..... 31 *a*

Do. ..... 33 *a*
Do. ..... 48 *h*

SMRITI CHANDRIKA. 43. (Their daughters) unmarried female children of those excluded from inheritanee. Must be maintained. By the persons that take the wealth of the father of those excluded from inheritance. In order to avoid the supposition that they are to be maintained for life like those excluded from inheritance, it has been said "Until they are provided with husbands," that is, until they are disposed of in marriage. Their childless wives, that is, the legitimate wives of those excluded from inheritance, being destitute of male issue and behaving always virtuously, are to be maintained by those who take the estate of the father of the disqualified persons in the same manner as the disqualified persons themselves are maintained. Such wives, however, as are unchaste or perverse towards the person maintaining them, are to be turned out of the house. Unchaste wives who have been expelled are not to be maintained, (1) but those that are perverse are to be maintained though they have been expelled..... 31 *a*

Do. ..... 32 *b*
Do. ..... 37 *b*

MADHAVYA.—But is not the rule that the wife takes first the property of a man without issue improper? For Nareda has said that, even if there be wives, the brothers take the property and support the wives :— "If any one among brothers, dies or renounces worldly

Page.

affairs (*i e* become a religious mendicant) and leaves no issue, the rest may share his property except the Stridhana, and let them support his wives as long as they live, if they preserve undefiled the bed of their husband; but from others they may resume it (the Stridhana)" We reply that this is not so, for if the text commencing from. "If any one among brothers dies and leaves no issue &c" to, "the share of re-united brother is approved for them," refers to re-union, then it would by the text," the share directed for re-united persons, that is for them; otherwise let there be a partition, (*i e*, the natural heirs share it); if there be any (brothers) without issue, let it go to the other (brothers)," be liable to charge of tautology; so on this account it refers to undivided (co-parceners) So the text of Yajnyawalkya: The wife (widow) takes first the property of her husband who has been separated and has not been re-united," does not involve a contradiction. But as for what Menu says: Let the father take first the property of an issueless son or let the brothers," and as for what Catyayana says :—" Let the father take the property of an issueless son who has been separated, or the brother, or sister, or mother, or his father in order." Menu's text does not refer to the order in which they take, because an alternative is implied by the word 'or, and the text of Catyayana refers to the case in which a father, &c. take an issueless son's property, because his wife (widow) is an adulteress; but a virtuous wife (widow) take the husband's property, for the (Catyayana) has said: "A vicious, shameless wife who wastes the property, and a woman given up to adultery, deserve not Stridhana." The meaning is, she does not deserve a wife's share, but only enough for her support. Dharecvara however with reference to the consequence of such texts as, "the wife takes the property of an issueless husband," has laid down a different rule viz.: that it is only a wife of an issueless man who has been divided and who seeks appointment (to procreate children) that takes the property of her husband, for as Menu says:—"He who keeps the estate and wife of his deceased brother, if he begets a son for his brother, he must give the son that wealth. If a younger brother begets a son by the wife of his elder brother, let there be in that case an equal partition; thus the law has been declared." He considers that in the case of a deceased brother with divided wealth, the wife's successions is through her son only, and not otherwise; so also if he be undivided..... 31 *a*

Do. ..... 37 *d*

Do. ..... 38 *b*

MADHAVYA.—The daughters of those who do not get shares, are to be supported till they are married, and their ceremonies are to be performed for them. Women who are well-behaved are also to be supported as long as they live; so he says:—"Their daughters are to be supported while unmarried, their childless women also, as long as they are well-behaved. Adulterous and refractory women are to be ex-

Page.

pelled." Vyasa mentions others who do not get shares :—"The son of a woman not married in order, or one begotten by a sagotra (blood-relation) are to be banished; there is no wealth for them." Menu also says.—Both the son of a woman not appointed, and the son begotten by a brother-in-law on a woman who has children, these, Viz: a Jarajataka and a Kamaja do not deserve a share." ..... 31 *a*

Do. ..... 32 *b*

Do. ..... 37 *b*

MITACSHARA.—13 & 20.

13. Their childless wives, conducting themselves aright, must be supported; but such, as are unchaste, should be expelled; and so, indeed, should those who are perverse." ..... 31 *a*

MITACSHARA NAREDA.—20. As for the text of Nareda, "Let them allow a maintenance to his women for life," § since re-union of parceners had been premised (in a former text viz: "The shares of re-united brethern are considered to be exclusively theirs;" (11) it must be meant to assign only a maintenance to their childless widows. Nor is tautology to be objected to that passage, the intermediate text being relative to re-united parceners ("Among brothers, if any one die without issue &c." (11) For woman's separate property is exempted from partition by this explanation of what had been before said; and a mere maintenance for the widow is at the same time ordained ..... 31 *a*

Do. ..... 34 *a*

VYAVAHARA MAYUKA.—Now, the punishment for a husband who puts away a wife possessed of good qualities, is declared: "The husband who puts away a wife that is obedient, not evil speaking, dexterous (at her duties), virtuous, and maintaining her conjugal vow, must be kept (in his duty to her) by a fine from the king." Yajnyawalkya (4) "He who forsakes a wife, though obedient to his commands, diligent in household management, mother of an excellent son, and speaking kindly, shall be compelled to pay the third part (of his wealth;) or, if poor, to provide a maintenance for that wife ..... 31 *a*

Do. ..... 37 *a*

VYAVAHARA MAYUKA.—But as for this of Nareda. (4) "Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But if they behave otherwise, the brethren may resume that allowance," it relates to the women of one dying unseparated (or) re-united, because the reading (of the text) is upon that very subject, according to Madana ..... 31 *a*

Do. ..... 37 *d*

Do. ..... 38 *d*

Page.

VYAVAHARA MAYUKA.—Yajnyawalkya (8) delivers a special rule concrening the daughters and wives of these. "Their daughters must be maintained likewise, until they are provided with husbands." "Their childless wives, conducting themselves aright, must be supported; but such as are unchaste, should be expelled: and so indeed should those who are perverse." If she be unchaste, a woman must be turned out of doors, and without a maintenance. A perverse woman also should be turned out of doors, but a maintenance must be provded for her, according to Madana; and others..... 31 *a*

Do. ..... 32 *b*

Do. ..... 37 *b*

MENU.—A wife, given by the gods, who are named in the bridal texts, let the husband receive and support constantly, if she be virtuous, though he married her not from inclination: such conduct will please the gods.

2. To be mothers, were women created; and to be fathers, men: religious rites, therefore, are ordained in the Veda to be performed by the husband together with the wife..... 32 *b*

MITACSHARA.—The author delivers a special rule concerning the daughters of disqualified persons: Their daughters must be maintained likewise, until they are provided with husbands." (11)..... 32 *b*

Do. ..... 51 *a*

SMRITI CHANDRIKA.—42 & 43.

42. The following, however, is a passage of the same author on a subject not already noticed. "Their daughters must be maintained likewise until they are provided with husbands. Their childless wives conducting themselves aright must be supported; but such as are unchaste should be expelled; and so indeed should those who are perverse."..... 32 *b*

Do. ..... 37 *b*

43. Entered in 31.

MADHAVA.—35 & 40.

35. Yajnyawalkya explains the succession to the property of a re-united (member) who has no issue: "one re-united takes the share of his deceased re-united (co-parceners) but should give it up if a son be born. A uterine brother also succeeds (in the same way) to a uterine brother."

C. The meaning is as follows: The other (surviving) re-united brother should give the share of a re-united brother deceased, to the child born afterwards of a wife whose pregnancy was not known at the time of partiton; but in default of a son, the re-united (brother)

Page.

should take the estate, not the wife &c. but he must support the wives, and daughters not betrothed. Nareda has also said this :— "And let them support his women as long as they live, provided they preserve, inviolate the bed of their husband, and from others they may resume it," (*i. e.* the stridhana.) The daughter's maintenance should be allowed out of her father's share :—Till her ceremony (marriage) is performed let her take a portion, afterwards let her husband support her." ..... 32 *b*

Do. ..... 33 *a*

Do. ..... 37 *b*

40. Entered in 31.

DAYABAGA.—Therefore the sons of such persons being either their natural offspring or issue raised up by the wife, as the case may be, are entitled, provided they be free from similar defects, to take their allotments according to the pretensions of their fathers. Their daughters must be maintained until married, and their childless wives must be supported for life. It is so declared by Yajnyawalkya : "Their sons whether legitimate or the offspring of the soil, are entitled to allotments if free from similar defects. Their daughters also must be maintained until provided with husbands. Their childless wives, conducting themselves aright, must be supported : but such as are unchaste, should be expelled ; and so indeed should those who are perverse..... 32 *b*

Do. ..... 37 *b*

DAYACRAMA SANGRAHA.—The incompetency of the wives of such persons to inherit has also been declared by the following text.—"Their childless wives conducting themselves aright, must be supported, but such as are unchaste, should be expelled, and so indeed should those who are perverse."—Their daughters also should be maintained until provided with husbands..... 32 *b*

Do. ..... 37 *b*

VYAVAHARA MAYUKA.—Gautama : (4) "A man shall not give, even what he has promised, to a person whom the law declares incapable of receiving." Gift or sale of a livelihood (Vitti) are thus forbidden by Vyasa (5). "They who are born, or yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should therefore be made..... 32 *a*

VYAVAHARA MAYUKA.—What things may be given, is declared by Brhaspati : (2) "A man may give what remains, after the food and clothing of his family." What must without fail be given, is told by Catyayana. (3) "He who delivers not a present which he has promised to a Brahman, shall be compelled to pay it as a debt, and incurs the first amercement."..... 33 *a*

Page.

MITACSHARA VYASA.—Therefore it is a settled point, that property in the paternal or ancestral estate is by birth (although) the father have independent power in the disposal of effects other than immoveables for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth: but he is subject to the control of his sons and the rest, in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained. "Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift of sale should, therefore, be made..... 33 *a*

Do. ..... 48 *e*

Do. ..... 114 *a*

NAREDA.—Entered in 31 *a*.

MADHAVYA.—The wife is a woman who has been sanctified by marriage, she takes first the wealth of her husband; as Brhaspati says:—"The wife of the man who dies leaving no son, takes his wealth though there be kinsmen, though parents and uterine brothers be alive.

Vaddha Menu mentions difference regarding this case:—"A wife (*i. e.* widow) who has no son, who preserves, inviolate the bed of her husband, and is steadfast in her duty, should offer the pinda for him and take the whole share."

C. "The whole share," consisting of the moveable and immoveable property. So Prajapati says:—"Taking his property, moveable and immoveable, the silver and base metal, grain, liquids, and clothes, let her cause the Craddhas in each month, at the sixth month and in each year, to be offered. Let her reverence her paternal uncles, priests, daughter's sons, her husband's sister's children, maternal uncle's, old men, and guests, with the offerings to the Pitro and gods." 34 *a*

MADHAVYA.—"Let those who are connected by the pinda, Gotra, and rishi share the wealth (of a deceased person) who is issueless, or his wife (widow) or let her conceive." And the author of the Summary says:—"Let a wife who has been appointed by her Guru's order (to bear offspring) take the wealth, if the brothers who have been divided are deceased; whether they were united or not." But this is wrong because there is nothing said about appointment in the text." The wife, daughters &c." "But if you rejoin that though nothing is said about it, yet that such an appointment is proper because of the force of what Gautama says; we reply that you are wrong; because Gautama's saying has another meaning. For the meaning of Gau-

Page.

tama's saying, " Let those who are connected by the pinda, Gotra or rishi share the wealth, or let the wife widow of a man who has left no issue conceive," is as follows ; if she conceive, let the wife of a man without issue take the wealth ; or let those connected by the pinda, Gotra and rishi and take the wealth of a man who leaves no issue ; or let the wife take it ; or let that wife conceive ; or let her remain chaste. And this is because there is no condition implied, as, 'or' expresses an alternative. But as for Menu's saying : " He who keeps, &c. this refers to a Xetrajua son's right to property ; and the Summary verse refers to a chaste widow, and not to one appointed to conceive by her husband's brother. For otherwise the sayings of Menu and Catyayana, " Let a childless widow being chaste, preserve inviolate the bed of her husband ; let her present the pinda for him and take the whole share ;" and, " Let a childless widow chaste, preserving inviolate the bed of her husband, subdued, enjoy till her death the property : let the heirs take after her," would be liable to a charge of being inconsistent. The conclusion which prevails accordingly is that the wife takes the property of her deceased husband who was divided and not re-united..... 34 *a*

Do. ..... 59 *e*

Do. ..... 83 *c*

MITACSHARA.—Or suppose, that, if the wealth be great, she takes precisely enough for her subsistence ; but if small, she receives a share equal to that of a son. This again is wrong : for variableness in the precept must be the consequence. Thus, if the estate be considerable, the texts above cited, (" his wives must be rendered partakers of like portions ;" and " let the mother also take an equal share"); assisted by another passage (" Let them allow a maintenance to his women for life ;" § 12) suggest an allotment adapted for bare support. But if the estate be considerable, the same passages indicate the assignment of a share equal to a son's..... 34 *a*

Do. ..... 34 *b*

SMRITI CHANDRIKA.—The term " Dhana" used in the text being simply indicative of property of any nature capable of affording the means of subsistence &c ; a portion of the landed property belonging to the family yielding an income equal to the share of wealth above prescribed may be assigned in lieu of the share of the undivided wealth. 35 *a*

Do. ..... 45 *a*

Smriti Chandrika.—Entered in 31 *a*

SMRITI CHANDRIKA.—The same author (Brahaspati) further declares by the following passage, that the assignment made by one for maintenance is to be kept up by the others also. " What has been given

Page.

to a widow by means of landed property for her maintenance by her father-in-law, the others are not competent to resume on the death of the father-in-law."..... 35 *a*

Do. ..... 45 *a*

Do. ..... 37 *a*

Entered in 8 and 31.

MITACSHARA.—The author adds a distinct maxim respecting the wives of disqualified persons :— "Their childless wives, conducting themelves aright, must be supported; but such, as are unchaste, should be expelled, and so indeed should those; who are perverse..... 37 *b*

NAREDA.—If a woman be disloyal ignominious tonsure, the lowest bed, the meanest food, the worst habitation, and the task of removing filth, constitute her punishment..... 37 *c*

YAJNYAWALKYA.—Let a man keep a disloyal wife deprived for her rights, squalid, maintained on a ball of grain alone, subdued, and only suffered to repose on the meanest bed..... 37 *c*

MENU.—A wife, excessively corrupt, let her husband confine to one apartment, and compel her to perform the penance ordained for a man who has committed adultery.

VRIHASPATI.—A wife who is disloyal, though maintained and guarded, let a man keep in his house, squalid in her person, suffered only to repose on the lowest bed, and maintained on a ball of grain alone.

2 But she who has criminally conversed with a man of low class, may legally be forsaken, or even put to death..... 37 *c*

SMRITI CHANDRIKA.—The text of Menu which declares: "The same rule applies to women. (Yoshit) even if they are degraded. Food and raiment are to be given to them and they are to remain in a corner of the house," is applicable to a case where a wife has to be maintained by the husband (1 *a*) This appears from the first hemistich of the text. Hence there is no inconsistency between this and the text of Nareda above quoted..... 37 *c*

SMRITI CHANDRIKA.—Hence, Nareda :—"Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But if they behave otherwise that allowance may be resumed."

(If they behave otherwise). If they persue an incontinent course.

(That allowance). Wealth consisting of grain, clothes, and money assigned for food and raiment.

(May be resumed) May be taken back..... 37 *d*

Do. ..... 38 *d*

Page.

NAREDA.—A husband who abandons an affectionate wife, or her who speaks not harshly, who is sensible, constant and faithful, shall be brought to his duty by the king with a severe chastisement..... 38 *a*

Do ..... 38 *b*

MENU.—She who neglects her lord, though addicted to gaming, fond of spirituous liquors or diseased, must be deserted for three months, and deprived of her ornaments and household furniture.

2. But she who is averse from a mad husband, or a deadly sinner, or an eunuch, or one without manly strength, or one afflicted with such maladies as punish crimes, must neither be deserted nor stripped of her property..... 38 *a*

VISHNU.—Vishnu says: The man who deserts a faultless wife, shall suffer the same punishment..... 38 *b*

YAJNYAWALKYA.—She who is deprived of her husband should not reside apart from her father, mother, son, or brother, from her husband's father or mother, or from her own maternal uncles; else she becomes infamous..... 38 *d*

Do. ..... 39 *a*

SMRITI CHANDRIKA.—The word "mother" includes a step-mother, it being said by Vishnu, "Mothers receive allotments according to the shares of sons."..... 48 *a*

DAYAKRAMA SANGRAHA.—Here since the term mother relates to the natural parents, the step-mother does not participate, but she must be maintained with food and raiment..... 48 *b*

SMRITI CHANDRIKA.—Although Vishnu declares (para 7) that daughters too are entitled to allotments according to the shares of sons, still it must be understood that this is not in right of inheritance, as in the case of brothers, but simply for the purpose of defraying the expenses of their marriages..... 48 *c*

SMRITI CHANDRIKA.—The text of Vishnu, "The initiations of unmaried daughters are to be defrayed in proportion to his own wealth," is applicable either to a case where no partition of heritage takes place from there being an only son, or to a case where brothers live in union..... 48 *c*

MITACSHARA.—27 It is said by Catyayana.:—"Heirless property goes to the king, (*b*) deducting however a subsistence for the females as well as the funeral charges: but the goods belonging to a venerable priest, let him bestow on venerable priests." "Heirless property," or wealth which is without an heir to succeed to it, "goes to the king," becomes the property of the sovereign; "deducting however

Page.

a subsistence for the females as well as the funeral charges;" that is, excluding or setting apart a sufficiency for the food and raiment of the women, and as much as may be requisite for the funeral repasts and other obsequies in honour of the late owner, the residue goes to the king. Such is the construction of the text. An exception is added; "but the goods belonging to a venerable priest," deducting however a subistence for the females as well as the charges of obsequies, 'let him now bestow on a venerable priest.'..... 48 *d*

MITACSHARA.—28 This relates to women kept in concubinage; for the term employed is "females" (Yoshid) The text of Nareda likewise relates to concubines; since the word there used is "women" (stri) Except the wealth of a Brahmana (property goes to the king on failure of heir) But a king, who is attentive to the obligations of duty, should give a maintenance to the women of such persons. The law of inheritance has been thus declared..... 48 *d*

DAYABHAGA.—In this manner must be understood the succession to property in the order in which the rank of wife is acknowledged therefore, since women, actually espoused may not have the rank of wives, the following passage of Nareda intends such a case: "Among brothers, in any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But, if they behave otherwise, the brethren may resume that allowance." So (this other passage) of the same author; ("On failure of heirs, the property goes to the king,") except the wealth of a Brahmana. But a king, who is attentive to the obligations of duty, should give a maintenance to the women of such persons. "The law of inheritance has been thus declared." The allotment of a maintenance to the women of such person, not being of the rank of wives, and the declared right of wives to succeed to the whole estate, constitute no discrepancy..... 48 *d*

VYAVAHARA MAYUKHA.—Moreover, the text of the same author, "Heirless property goes to the king, deducting however a subsistence for the female, as well as the funeral charges: but the goods belonging to a venerable priest (Crotriya) let him bestow on venerable priests:" and further that of Nareda. (2) Except the wealth of a Brahmana (property goes to the king on failure of heirs. A king is attentive to the obligations of duty, should give something as maintenance to the women of such persons. The law of inheritance is thus declared:" have both reference to women set apart, because the term lawful wife (Patni) is not mentioned..... 48 *d*

YAJNYAWALKYA.—After assigning a sufficient support to infants, to a married daughter residing in the house of her father, to aged persons,

Page.

pregnant women, persons afflicted with disease, damsels yet unmarried, guests and servants, the husband and wife may enjoy the residue. 48 *g*

Do. ..... 118 *a*

MITACSHARA.—From the mention of a Cudra in this place (it follows, that)the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance..... 49 *a*

MITACSHARA.—5. 2. and 13. These persons (the impotent man and the rest)are excluded from participation. They do not share the estate. They must be supported by an allowance of food and raiment only; and the penalty of degradation is incurred if they be not maintained. For Menu says: "But is it fit that a wise man should give all of them food and raiment without stint to the best of his power; for he, who gives it not, shall be deemed an outcaste." "Without stint" signifies, 'for life.'

12. Entered in the page 32..... 51 *a*

MITACSHARA.—13 Their daughters, or the female children of such persons, must be supported, until they be disposed of in marriage. Under the suggestion of the word "likewise" the expenses of their nuptials must be also defrayed..... 51 *a*

DAYBAHAGA.—10. 11. and 12. 10.

Yajnyawalkya says, "An out-caste and his issue, an impotent person, one lame, a madman, an idiot, a blind man, a person afflicted with an incurable disease, (as well as others similarly disqualified), must be maintained; excluding them however from participation. One who cannot walk, is lame..... 51 *a*

DAYABHAGA.—11. Although they be excluded from participation, they ought to be maintained, excepting however the out-caste and his son. That is taught by Devala: "When the father is dead (as well as in his life-time) an impotent man, a leper, a mad man, an idiot, a blind man, an out-caste the offspring of an out-caste and a person wearing the token (of religious mendicity), are not competent to share the heritage. Food and raiment should be given to them, excepting the out-caste. But the sons of such persons, being free from similar defects, shall obtain their father's share of the inheritance." A person wearing the token of mendicity is one who has become a religious wanderer or ascetic..... 51 *a*

DAYABHAGA.—12. By the term out-caste his son also is intended; for he is degraded, being pro-created by an out-caste. That is confirmed by Baudhayana, who says, "Let the co-heirs support with food and apparel

Page.

those who are incapable of business, as well as the blind, idiots, impotent persons" those afflicted with disease and calamity, and others who are incompetent to the performance of duties; excepting however the out-caste and his issue.

SMRITI CHANDRIKA.—All those that are above enumerated as incompetent to inherit are yet entitled to be maintained. Accordingly, Yajnyawalkya: "An impotent person, an out-caste, and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease and others (similarly disqualifed) must be maintained, excluding them, however, from participation..... 51 *a*

DATTAKA MIMANSA ATRI.—3. On this subject, Atri says so, "By a man destitute of a son only, must a substitute for the same, always be adopted: with some one resource, (yasmát tasmát prayatnatas) for the sake of the funeral cake, water, and solemn rites."..... 58 *a*

Do. ..... 77 *a*
Do. ..... 78 *a*
Do. ..... 78 *c*
Do. ..... 81 *c d*
Do. ..... 83 *b*
Do. ..... 95 *c*

DATTAKA MIMANSA MENU.—9. Menu also "A son of any description must be anxiously adopted by one who has none: for the sake of the funeral cake, water, and solemn rites; and for the celebrity of his name." He who has no son may appoint his daughter in this manner to raise up a son for him &c. &c..... 58 *a*

Do. ..... 59 *b*
Do. ..... 77 *a*
Do. ..... 78 *a*
Do. ..... 78 *c*
Do. ..... 81 *c d*
Do. ..... 95 *c*

DATTAKA MIMANSA MENU.—42. This even is made obvious by Menu (who says) "For, the obsequies would fail." Because the failure of these would ensue; if on default of a legitimate son, the affiliation of a substitute might not take place. Obsequies, are funeral rites, consisting in presenting oblations of food and water, and so forth. In the same manner by Atri also (it is said) "For the sake of the funeral cake, water and solemn rites." Thus the whole is unimpeachable..... 58 *a*

DATTAKA MIMANSA KALIKAPURANA.—45. And accordingly in the kalikapurana, an indication of Vetala and Bhairava, sons of Çiva, becoming

Page.

both fathers of male issue, by means of the same son, is thus found: "The sages said: There is no salvation for one destitute of male issue. This is recognised in the world and Vedas. Vetala and Bhairava formerly went to a mountain to perform devotion. Previous to that, they were unmarried, and sons of them, are not mentioned, (as having been born, or not born. If sons were born. O excellent of the regenerate), we much wish to hear: the particulars concerning them. Markandeya replied; 'salvation is not for one destitute of male issue, both in the next world, and in this. O excellent saints, those, who are fathers of male issue, by means of their own sons, and those of brothers, attain heaven. Having in this world attained great perfection, when Vetala and Bhairava reached the abode of the great deity, they were happy on the hill kailasa. Then, Oh! twice-born men Nandi by the order of civa, as one consoling addressed them in private in the following true and instructive speech: he said, "Do you sons of Civa, destitute of male issue, exert yourselves in the production of a son. By one to whom a son is born every where salvation is easily attained." Markandya continued: 'having heard these words of Nandi, they became elated in their hearts, and said to him: "we will make one (son) only." Accordingly Bhairava, at some time, copulated with Urvasi, a celestial nymph, and procreated on her a son named Suveca. Vetala also affiliated him as his son: and in consequence, by means of this son, both attained heavenly salvation."..... 58 *a*

Do. ..... 62 *d*

DATTAKA MIMANSA.—Consequently, the son being the instrumental cause, in an act, the object to result from which, is absolution from debt: on his failure the son given, and the rest may without repugnancy, be substitutes: in the same manner, as (at a sacrifice) where the 'Soma' plant is wanting, the 'pulika' is a substitute..... 58 *a*

Do. ..... 59 *a*

Do. ..... 95 *a*

DATTAKA CHANDRIKA.—On this subject Menu says: "A son of any description must be anxiously adopted, by a man destitute of male issue, for the sake of the funeral cake, water, and solemn rites; and for the celebrity of his name." Atri. "By a man destitute of male issue only, must the substitute for a son of some one description, always be anxiously adopted: for the sake of the funeral cake, water and solemn rites (*a*)..... 58 *a*

Do. ..... 59 *b*

MENU.—Since the son (trayate) delivers his father from the hell named put, he was therefore called puttra by Brahma himself..... 58 *a*

Do. ..... 59 *c*

Page.

VISHNU SUTRAS.—44. to 46.

44. Because he saves (trayate) his father from the hell called; "Put;" therefore (a male child) is called Put-tra (protector from Put) (son) by Svayambhu himself.

45. (The father) throws his debts on the (son) and obtains immortality, if he sees the face of a living son..... 58 *a*

VISHNU SUTRAS.—46. Through a son he conquers the worlds, through a grandson he obtains immortality, and through the son's grandson he gains the world of the son..... 58 *a*

DAYABHAGA APASTAMBA.—"Since a son delivers his father from the hell called put therefore he is named puttra by the self-existent himself." By this and similar passages, great benefits are stated, as effected by means of a son. His connection with the property is therefore the reward of his beneficial acts. If then he neglect them, how should he have his hire? Accordingly Menu says, "All those brothers, who are addicted to vice, lose their title to the inheritance."..... 59 *a*

VISHNU SUTRA.—And he who takes the wealth presents the funeral oblation (to the deceased)..... 59 *a*

HARITA.—303. A certain hell is called put; and, he who is destitute of of male issue, is there tormented: a son is therefore called puttra because he delivers his father from that region of horror..... 59 *c*

VRIHASPATI.—Because a son delivers his father from the hell called put, even by the sight of his countenance, therefore is a man solicitous for the birth of a son.

2. A son's son, and the son of an appointed daughter, both contribute to the attainment of heavenly bliss: both are eqully pronounced fit for inheritance, and oblations of funeral cakes..... 59 *c*

VASISHTA.—The endless abodes are allotted to those who leave male issue; it is recorded, that "heaven is not for him who leaves no male progeny." Enemies therefore pronounce this curse, "May they be childless, and become evil spirits!" The want of male issue is the great cause of destruction; therefore is a son desired..... 59 *c*

YAJNYAWALKYA.—Through a son, a son's son, and the son of grandson, the father or ancestor obtains bliss in the other world, immortality and heavens; but the double set of oblations and the funeral cake are offered by a man's own son and other descendants, whether principal or subsidiary Menu. 64 to 68..... 59 *c*

MENU.—64. By men twice-born classes no widow, or childless wife, must be authorized to conceive by any other than her lord, for they, who authorize her to conceive by any other, violate the primeval law. 59 *d*

Page.

MENU.—65 Such a commission to a brother or other near kinsman is no where mentioned in the nuptial texts of the Veda; nor his marriage of a widow even named in the laws concerning marriage..... 59 *d*

MENU.—66 This practice, fit only for cattle, is reprehended by learned Brahmans: yet it is declared to have been the practice even of men, while Vena had sovereign power..... 59 *d*

MENU.—67. He, possessing the whole earth, and thence only called the chief of sage monarchs, gave rise to a confusion of classes, when his intellect became weak through lust..... 59 *d*

MENU.—68. Since his time the virtuous disapprove of that man, who, through delusion of mind, directs a widow to receive the caresses of another for the sake of progeny..... 59 *d*

MENU.—He, who was begotten, according to law, on the wife of a man deceased or impotent, or disordered, after due authority given to her, is called the lawful son of the wife..... 59 *d*

YAJNYAWALKYA.—The son begotten by one who has no male issue, or the wife of another, after due authority given to him, is considered as heir to both, and shall present the funeral cake to both fathers..... 59 *d*

MITACSHARA.—A child, begotten by another person, namely by a kinsman, or by a brother of the husband is a wife's son (kshetraja)..... 59 *d*

SMRITI CHANDRIKA.—The same author (Menu) defines "Kshetraja and the other classes of secondary sons:"..... 59 *d*

MADANIA.—The Xetraja is a son of a wife by a kinsman or other appointed to beget issue for the husband.

BAUDHAYANA SUTRA.—He who is begotten by another person on the wife of a deceased man, or on the wives of an eunuch, or of one incurably diseased, with permission, is called 'the son begotten on a wife (Kshetraja). Such a son has two fathers and belongs to two families; he has a right to perform the funeral oblations, and to inherit the property of (his) two (fathers).

In regard to this they quote also (the following verse):

"The son of two fathers gives the funeral oblations to his two fathers, and pronounces two names with every oblation, and three oblations shall serve for six persons. He who does so, will never err."..... 59 *d*

VASISHTA SUTRA.—The second is the son begotten on a (man's wife or widow who was) appointed (thereto by a kinsman)..... 59 *d*

Pages

VRIHASPATI.—Vrihaspati, after premising the Cali age:—Sons of many different sorts, who were made, by ancient Sages, cannot now be adopted by modern men, destitute of eminent powers..... 59 *e*

Do. ..... 83 *c*

ADITYA PURANA.—The filiation of any but a son legally begotten, or given in adoption by his parents, is a part of ancient law abrogated in the Cali age..... 59 *e*

Do. ..... 83 *c*

DATTAKA MIMANSA.—Nor must it be affirmed that the injunctions in question regards those other than the brother's son: for there is no proof of such partial application; and on the other hand, it would be at variance with the instance of the adoption by Vetala of the son of (his brother) Bhairava, contained in the portion (of the extract from the Kalikapurana, before quoted) commencing, "We will make one son only" and ending "Vetala also affiliated him, as his son."

DATTAKA MIMANSA.—Moreover, in the case, where, of ten whole brothers, five have each ten sons, and five are wholly destitute of male issue, it would follow, that the five brothers destitute of male issue, would have each fifty sons; and it would also result, that the fifty sons would severally have ten fathers: thus, there would be a great absurdity..... 59 *e*

Do. ..... 83 *c*

DATTAKA CHANDRIKA.—Vide..... 65 *h*

MADAVIA.—The texts which go to prove that the other substitute sons besides the Datta share in the inheritance, refer to some other age of the world; because it is prohibited in another Smirthi to receive them as sons in the Kali age:—"The receiving of others that the Datta and Aurasa as sons, the begetting of offspring by a brother-in-law and retiring to the forest, all these practices the wise have said should be avoided in the Kali ages."

SMRITI CHANDRIKA.—The appointment of a daughter to raise up a son to her father must also be considered by the same text to be prohibited in the kali age, such a son not being either one of the body or adopted. The conclusion hence is that, in the kali age in default of a legitimate son or grandson, the adopted son alone and none else is recognised as a subsidiary son.

DATTAKA MIMANSA PARASARA.—The term, "given" is inclusive also, of the son made, (Kritrima) on account of a text of Paracara, on the occasion of treating on the law of the Kali age, which expresses, "The son of the body (Aurasa) the son of the wife, also, the son given, the son made, &c..... 59 *f*

Page.

NOTE V. 671 S. H. L.—

DAITA NIRNAYA OF VACHASPATI MISRA.—Is incapable in her own right of adoption (P. 222). This position may be questioned, and does not appear to be a generally received rule. In the tract of country denominated Mitthila, a custom prevails of the adoption by a widow of a kritrima son, for the performance of her Sapindikarana, or right of association with deparated ancestors, the observance of which, on the eleventh day from her decease, exempts the other relatives who are unable to celebrate such ceremony from observing in her honour (as they otherwise would have to do,) twelve monthly funeral repasts. The practice is perhaps founded on, or justified by the following passage from the Dvaitanirnaya of Vachaspati-misra, an author of paramount authority in the 'Mitthila' country. "Its "purpose is for the man that he may be excluded from the hell de- "nominated 'put;' for the woman, that some one may exist, capable of "performing her rite of Sapindkarana or association with departed an- "cestors. Should individuals capable of promoting these objects exist, "a son must not be adopted. Accordingly, from the resemblance to "the condition of being parents of male issue; where the son of a "whole brother may exist, by a man, other persons,—and where the "son of a rival wife may exist, by a female, sons made, and so forth, "must not be affiliated. To this doctrine conform Ashaya, Udaya- "kara, the kalpataru, the Parijada, the Ratnakara and other works." This passage sufficiently explains, why the custom in question is restricted to widows. A husband is capable of performing the Sapindana, or Sapindi-karana, (for the terms are synonimous) for his deceased wife. On the same principle should the husband leave an adoptive son who would necessarily be filially related to his wife, the widow could not adopt a peculiar son for herself. The son affiliated by a widow, according to the custom noticed, is not regarded as related in any way to her husband, and merely succeeds to her exclusive property..... 59 *f*

Do. ..... 70 *c*

DATTAKA MIMANSA.—18. If it is contended, then, that she may adopt a son, with the assent of the kinsman even; it is wrong: for the term, "Husband" would become indefinite: and the purpose would not be attained. *Now the purpose of the husband's sanction, is that the filiation, as son of the husband, may be complete, even by means of an adoption, made by the wife*..... 62 *a*

Do. ..... 78 *c*

Do. ..... 84 *c*

Do. ..... 85 *a*

Page.

JAGANNAD.—II. Dig. 3d p. 394.—

Males only need sons to relieve them from the debt due to ancestors. Accordingly, the sage Mandapala, desiring admission to a region of bliss, but repulsed by the guards, who watch the abode of progenitors, because he had no male issue, accepted a bird for his consort, that he might earlier obtain a son; and it is recorded in the Mahabarata and other works, that Jaratcara, Ruchi, and other males, have taken wives for the sake of obtaining male issue, but it is no where said that a woman has taken a husband for that purpose. Accordingly, in the double set of oblations, it is indispensably necessary that the son should perform the Straddha for the paternal line, not for the line of his maternal grandfather; but it is simply reprehensible in one who performs the Straddha for the paternal ancestors, not to perform it also for the maternal grand-father and his progenitors. Consequently, since the Straddha may be performed without noticing the maternal grandfather's line in a subordinate double set of oblations and the like, the Straddha for the maternal ancestors is not requisite to the completion of the obsequies performed in the dark fortnight of Aswina. This observation of Raghunandana and others is accurate. Accordingly a widow, though she may perform acts of religion without consent previously declared by her deceased lord, cannot, without such consent, adopt a son given; for the text of Vasishta expresses, "let not a woman give or accept a son," &c. (CCLXXIII). *But, if her husband assented, she may adopt a son given, as a son of the wife is raised up to a husband by his consent*; else it should have been expressed in the law, "he shall not be the son of her husband unless adopted with the assent of her lord, but shall be her own son to perform her obsequies and take her inheritance." A son given is therefore the child, not of his adoptive mother, but of his adoptive father only..... 62 *b*

Do. ..... 62 *d*

Do. ..... 93 *a*

MENU.—'He, whom his father, or mother with her husband's assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water.'..... 62 *c*

Do. ..... 63 *a*

Do. ..... 64 *a*

Do. ..... 67 *a*

MENU.—He is considered as a son made or adopted, whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of performing obsequies to his adopter, and with the sin of omitting them..... 62 *a*

Page.

YAJNYAWALKYA.—That son whom his father, or his mother with her husband's assent, gives to another, shall be considered as a son given..... 62 *c*

Do. ..... 63 *a*
Do. ..... 64 *a*
Do. ..... 67 *a*

VASISHTA.—A son formed of seminal fluids, and of blood, proceeds from his father and mother as an effect from its cause: both parents have power, for just reasons, to give, to sell, or to desert him: but let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son, unless with the assent of her lord. He who means to adopt a son, must assemble his kinsmen, give humble notice to the king; and then, having made an oblation to fire with words from the Veda, in the midst of his dwelling house, he may receive, as his son by adoption, a boy nearly allied to him, or, on failure of such, even one remotely allied: but if doubt arise let him treat the remote kinsman as a Sudra. The class ought to be known, for through one son the adopter rescues many ancestors..... 62 *c*

Do. ..... 62 *d*
Do. ..... 63 *a*
Do. ..... 64 *a*
Do. ..... 67 *a*
Do. ..... 73 *a*
Do. ..... 78 *c*
Do. ..... 81 *a*
Do. ..... 89 *b*
Do. ..... 93 *b*
Do. ..... 94 *a*
Do. ..... 62 *c*

JAGANNADA.—II Dig. 3d p. 391.

When this argument is proposed, the answer is, yet notice to the king and convocation of kinsmen are necessary for a son or secular purpose, namely, that the adopter's brothers and the rest may know the name and class of the child, and so forth, after thoroughly investigating all circumstances: for this reason (the purpose not being indispensable,) affiliation is in some instances valid, even without this unessential part of the ceremony. In like manner, should the oblation to fire be partly omitted in consequence of inability to complete it, the adoption is sometimes good in law, as marriage and the like are valid in similar circumstances.

The meaning of that observation of Vachespati Bhattachary may be thus explained: if the intention of the party be only declared in this form, "I give you this damsel," she continues a maiden, and

Page.

the acceptor does not become her husband; on the contrary, she may be given to another as a girl called Pritha was bestowed by the father of Vasudeva on Cuntibhoja, and afterwards given by him to Pandus, but if the intention of the party be thus expressed, "I give this damsel to be thy wife," she becomes the wife of the acceptor, and cannot with propriety be given to another; this alone constitutes marriage: so, if a gift be made declaratory of property only, then property alone is conferred, as in the case of a slave; but if the declared intention be expressed in these words, "I give him to you as a son," and if the acceptor's intention be thus expressed, "I take him as a son," he becomes a son, nothing else is required.

Since the Calicapurana declares filiation null, if tonsure and other ceremonies, preceded by the enunciation of the family name, be omitted (CLXXXII,) this is necessary to assist adoption. But since no one has declared that filiation is null if the oblation to fire with holy words from the Veda be omitted, the validity of adoption by gift and acceptance only, without such an oblation, is fully proved by reasoning. However, as a son is produced from secundation without the recital of holy texts from the Veda, but a son is perfected by the recital of them (for Yajnyawalkya declares, "sin, arising from the seed and womb, is expiated by the ceremony of tonsure, and by those which precede it;") so, even without an oblation to fire sanctified by holy words from the Veda, adoption, the object of that act of the will called acceptance, is indeed valid, but no special perfection arises. On the other hand, tonsure and other ceremonies, preceded by announcing the family name of the natural father, having been already performed, the claim to the orginial family cannot be forfeited; how then can the child become son of another? On this and similar reasoning is founded the text of the Calicapurana, which we revere as the commandment of our master. Without minute investigation, it is admitted, that the adoption of a boy, for whom tonsure and other ceremonies had been already performed after announcing the family name of his natural father, is void. ..... 62 *c*

Do. ..... 65 *a*

JAGANNADA.—II. Dig. 3d. p. 388.

As an only son should not be given, so he should not be sold or deserted. Sale is a great offence, even though made in a season of calamity, when a maintenance cannot be provided; desertion is a great offence, because the family becomes thereby extinct. Thus the Pracasa. Let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct: but this does not invalidate the adoption of such a son actually given to him. Some hold, that if an only son be given by a woman unauthorized by her lord, the donation is void,

Page.

as if he had been given by a person who was insane or the like. "Let not a woman give a son without the assent of her lord;" the reason is, that a thing belonging to two persons ought not to be given by one without the assent of the other. If a donation of joint-property, made by one parcener be valid, why should not the gift of a son, who belongs in common to his father and mother, be likewise good in law? If single property, arising from the single efficient act of two persons, be attributed to both, then; should the thing be given away by either of them, that property being divested, the right of both is lost: but, in this case, a son being produced by distinct acts, one person furnishing seminal fluids, the other furnishing uterine blood, distinct property is created; and the gift made by one annuls his or her property only. It should not be objected, that the acts of procreation would be several, from the difference of time and persons. Although the acts be several, the procreation is one. Thus the reason why a son has property in the paternal estate, must be deduced from his birth being caused by his father; but the reason of a mother's property in her son must be deduced from his proceeding from her blood; and the reason of a father's property, from the child's proceeding from his seminal fluids. Although the same cause might here have been invariably assigned for this same effect, that must not be done in the present instance, because these different causes are established in conformity with the texts of Sages.

From the phrase "let not a woman give a son," as from the expression "let not a parcener give away joint-property," does it not appear simply, that the gift ought not to be made, but the donation is not void? Then it should have been only said, "let not one give a son without the assent of the other;" for the husband ought not, by his sole act, to aliene property held in common with his wife. The husband, therefore, has the primary right over his son, as appears from texts (CCLIII. I and CCLII 4); but the wife, being dependent on him, has a secondary property, because the son was produced from the united operation of her blood with the seminal juices of the father, and because she bore the child in her womb. Hence gift made by a dependent person, without the assent of the principal owner, is void: and this is accurate, according to the opinion of those who contend for the right of the husband to the property of his wife (B II. Chapter IV. V. LVI.)

"Nor let a woman accept a son without the assent of her lord." If a son be accepted by a wife without the assent of her husband, her property in that child is valid, but not his performance of filial duties: he can neither possess the heritage, nor offer the Sraddha or the like, for it is shown that the adoption of a son is the act of the man; in no code of law is it found that adoption can be the act of

Page.

the woman. It should not be argued, that the offspring of an unmarried girl and the rest become adoptive sons through the act of a woman. Although she produce the child through lust, his filiation is valid by the choice of the father, or by the authority of law, not by the choice of the woman. Thus the mention of gift, by the joint act of the father and mother, is intended to show the means of effecting a donation productive of no immoral consequence; but the gift made by the man alone is valid. However, the mother's claim is not annulled by his donation. But a child belonging to his natural mother, and to his adoptive father, is not truly considered in practice as a son given; the adopter should therefore obtain the assent of both parents..... 62 *d*

Do. ..... 93 *a*

MENU.—And, like those abstemious men, a virtuous wife ascends to heaven, though she have no child, if, after the decease of her lord, she devote herself to pious austerity..... 62 *d*

DATTAKA CHANDRIKHA.—It must not be argued, that from the qualities of being male and singular, being attributed to the adopting party, by the expression "a man destitute of male issue," something definite is meant: therefore the same person must not be adopted by two individuals nor any son by women. For the adoption of the Duyamushyayana or son of two fathers by two persons will be presently declared; (and) women with the sanction of their husbands are competent to adopt: as Vasistha shews: "Let not a woman either give or receive a son in adoption: unless with the assent of her husband.".. 62 *d*

Do. ..... 93 *a*

DATTAKA CHANDRIKHA.—24. Should this be objected, it is wrong. In the same manner as where the curd, which is the object contemplated by the person proceeding to produce the grumous subtance alluded to in the passage of the Vedas subjoined—is wanting, it is that substance which causes the individual to proceed therein and not the whey or serouspart (incidentally produced), for that not being the object is of no use. "He mixes coagulated milk (dadhi) in boiled milk; that is a curd of two milk whey (amiksha) an oblation to the Vaisvadeva set of divinities, and whey for horses." Or, in the same manner, as on the anniversary of the decease of a father, (who died during the first half of Acuina denominated pitripaksha), the ceremonials of a parvana rite having been completed in honor of the father and other two paternal ancestors in ascent above him, a parvana rite is not recommended on account of the funeral repast in honour of the maternal grandfather and other two male ancestors (on the mother's side) for the commencement of the same depends on the funeral repast in honour of the paternal ancestors, (which in this instance would have been already completed):—So also in the case in question, the affiliation of a

Page.

son by woman proceeding legally, with the sanction of her husband, to constitute for him male issue, only takes place where no son of that person may exist. But,if he have any, although she may be destitute of the same, such adoption does not obtain; for to proceed therein would be unproductive of the object..... 62 *d*

Do. ..... 81 *b*

Do. ..... 81 *c*

Do. ..... 93 *a*

DATTAKA MIMANSA.—"By a man destitute of a son." From the masculine gender being here used, it follows that a woman is incompetent (to adopt.) Accordingly Vasishta ordains; "Let not a woman either give or receive a son in adoption: unless with the assent of her husband." 62 *d*

Do. ..... 62 *e*

Do. ..... 93 *a*

Vide. Kalikapurana in 58 *a*

Vasishta in 62 *c*

DATTAKA MIMANSA.—And in the case in question, the wife being mentioned as the instrumental means, a primary author of the act, is obtained; for otherwise, one accepted in adoption by the wife, being son to such his mother (only) since his connection, as lineage to her husband, would be wanting, his incompetency to perform the funeral rites of the husband would result; and no father existing at his marriage, and so forth, the paternal family and other particulars must of consequence remain unspecified..... 62 *e*

DATTAKA MIMANSA.—If the case is thus, then the assent of the wife is requisite for the husband also; for the purpose (of such sanction) would be the same; (as that of the husband to the adoption by the wife). This (if alleged) is wrong; for in consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted, as son of the wife, is complete in the same manner as her property, in any other thing accepted by the husband..... 62 *f*

Do. ..... 62 *g*

DATTA.—Wealth is common to the married pair.

2. After the death of her lord, the mother shall have an equal share with her sons..... 62 *g*

JAGANNADA.—II DIG. 3 p 399.

What some affirm to be Chandeswara's notion is questionable. They hold, that if an orphan give himself, he is a son self-given, but if one whose mother is living, and who is bestowed by her give himself, he is in law a son given, as suggested by the particle (va "or") in the text of Yajnyawalkya (C C L. XX II.)

That the boy's gift of himself confers a right equal to his father's, appears from the definition of a son self-given: and this is reasonable, say these lawyers; for, after the death of the father, his whole wealth becomes the property of the son, and a donee has property in that which is given to him by that heir; so, after the death of the father, the son has a proprietary right over himself, and that right is transferred to the donee by his gift: hence a boy whose father and mother are living, but who is forsaken by them, becomes by his own donation as son self-given. Would not a boy given by his mother, after the death of the father, thus become a son self-given? That is admissible, say these lawyers but: in fact, a right equal to that of the father is conferred by the son's donation; and by the mother's gift every claim is cancelled. That opinion is questionable; for adoption consists in the acquisition of a right equal to that of the father: if that be effected by the boy's own donation, he is a son self-given; if it be effected by the father's gift, the boy is a son given: such is the distinction. But if a boy be given by his widowed mother, a right equal to that of the father is not effected by her donation, but by the boy's gift of himself; he ought therefore to be considered as a son self-given. It should be here remarked, that, after the death of the father, his son's son, whose own father is dead, has a title to other paternal wealth; but is not acknowledged to have any right over the son, for no such right does exist over a son and a wife: and this is reasonable. Thus much, say the lawyers, whose opinion was first cited, has been mentioned by way of illustration.

Cullucabhatta holds that the father and mother should make the gift with mutual consent. The reasoning on which this is grounded must be sought. But in fact that alone is proper. Vachespati-Misra likewise affirms, that adoption is only valid if the gift be jointly made by both parents.

The mother being subject to the power of her husband, her property is divested by his gift; but it is not so in the case of wealth obtained through favour or the like, because there is no subjection in respect of such property. Thus, if a son be adopted by the husband, the wife has a secondary claim to that child, because property is common to the married pair (CCCC XV.); and the line of the maternal grand-father is the ancestry of the adopter's father-in-law. This opinion authors deduce from the gloss delivered by Chandeswara on a text cited in a former Book (Book III, Chap. I, V L II-I,) and from the gloss of Cullucabhatta on the subsequent text (Book III. Chap. I-V-LII-2).

The Retnacara contains the following gloss on the text of Vasishtha (CCL XXIII): he who means to adopt a son must assemble his kinsmen, that the boy adopted as a son given may thereafter obtain

Page.

a share. Assembling his own heirs, he may receive, as his son by adoption, a boy not remotely allied to him, that is, nearly allied to him, such as the son of his own maternal uncle or the like: this is intended for the better ascertainment of the boy's name and class. On failure of near kinsmen, he may take one not nearly allied to him; for the name and primitive stock may be ascertained by other positive proof: the particle *eva* here bears the sense of "even." But if doubt arise, that is, if it be doubted by one who adopts a remote kinsman whether he belong to the sacerdotal class or the like, let him treat the boy like a son by a Sudra, employing him only in the business of the house. "For through one he rescues many," because, through one son, the adopter saves many ancestors, therefore he should take for adoption a boy whose class and family are not dubious..... 62 *g*

Vide 62 *c*—65 *a*

DATTAKA CHANDRIKA VASISHTHA.—And accordingly if the right of investiture merely be performed (by the adopter, the previous rites having been performed by the natural father), the filiation of the son given, as son of the adopter is completed; in conformity with the text of Vasishtha subjoined. But this must be understood in respect to an adoption taking place within the primary season for the rite in question which extends to the eighth year; otherwise, (in the case of an adoption after the expiration of such season), the capacity of having been able to perform that rite, during the principal season being wanting, as there would be no ability for the same at a secondary season, the rite would remain unperformed, (unless as required in such inferior adoption the rite of tonsure; preceded by a sacrifice for male issue were renewed.) Text. Sprung from one following a different Cakha (or branch of the vedas) the given son even when invested with the characteristic thread under the family name of the man himself, according to the form prescribed by his peculiar Cakha becomes participant of the duties of such Cakha..... 65 *b*

DATTAKA CHANDRIKA VASISHTA.—And thus, on account of uniformity of import with the text of Vasishtha before cited, by the compound epithet 'Chúdadíya' in the quality conveyed by which the term 'Chúda' is not included, rites commencing with that of investiture for persons of a regenerate tribe would be suggested; but for Cudras marriage and so forth implied..... 65 *b*

Do. ..... 65 *d*
Do. ..... 65 *g*
Do. ..... 76 *a*

VYAVAHARA MAYUKA—KALIKA PURANA.—As for this text of the Kalika Purana! "O Lord of the earth, a son, having been initiated under the family name of his father, unto the ceremony of tonsure inclusive,

Page.

does not become the son of another man (anyastas). The ceremony of tonsure and of investiture 2 being indeed performed, under his own family name, sons given, and the rest may be considered as issue: else they are termed slaves. After their fifth year, O king, sons given, and the rest are not sons. (But) having taken a boy five years old the adopter should first perform the sacrifice for male issue." It relates to as a gotras only. Unto the ceremony of tonsure inclusive ; The particle, ang, here is inceptive, used for the sake of entirely including cases ; for if it be meant as a limit conclusive, it will have the objection of being in opposition to the ceremonies of tonsure and investiture (specified in the text). But such reliance is not to be placed on this last passage, because it is not to be found in two or three copies of the Kalika Purana. . 65 b

MENU. 36 to 39.—

36. ' In the eighth year from the conception of a Brahman, in the eleventh from that of a Kshatriya and in the twelth from that of a Vaisya, let the father invest the child with the mark of his class..... 65 *c*

Do. ..... 65 *g*

MENU.—37. Should a Brahman, or his father for him, be desirous of his advancement in sacred knowledge; a Kshatriya, of extending his power, or a Vaisya, of engaging in mercantile business; the investiture may be made in the fifth, sixth or eighth years respctively... 65 *c*

MENU.—38. The ceremony of investiture hallowed by the gayatri must not be delayed, in the case of a priest beyond the sixteenth year; nor in that of a soldier beyond the twenty-second, nor in that of a merchant beyond twenty-fourth..... 65 *c*

MENU.—39. After that, all youths of these three classes, who have not been invested at the proper time, become uratyas, or out-castes, degraded from the gayatri and contemned by the virtuous..... 65 *c*

Do. ..... 65 *c*

MENU.—There is no guilt in a man of the servile class who eats leeks and other forbidden vegetables, he must not have the sacred investiture: he has no business with the duty of making oblations to fire and the like ; but there is no prohibition against his offering dressed grain as a sacrifice, by way of discharging his own duty..... 65 *d*

Do. ..... 65 *g*

Vide: 65 *b*

CALICAPURANA.—He, O lord of the earth ! on whom the ceremonies should be performed under the family name of his father, is not deemed a son until the ceremony of tonsure have been completed ; he becomes the son of another, under whose family name it is performed.

Page.

2. Sons given and the rest, whom the ceremonies of tonsure and the like have been performed on them by the adopter's own family, are deemed adopted sons; any other is called a slave..... 65 *e*

Do. ..... 65 *f*

CALICAPURANA.—But after their fifth year, O king! sons given and the rest must not be adopted; let the adopter take a boy five years old, and first perform a sacrifice for male offspring..... 65 *e*

Do. ..... 65 *f*

DATTAKA MIMANSA.—Since, that filial state, is produced from ceremonies; in the same manner as the being a sacrificial post and so forth; it is established that one uninitiated is to be adopted..... 65 *e*

DATTAKA CHANDRIKA.—"After the fifth year." This regards a Brahmana, seeking the fruit of holiness resulting from the study of scripture. For since the fifth year only is the principal season for the investiture of the characteristic thread of one, desirous of such holiness, as is shewn by this text. For a Brahmana desirous of holiness, resulting from the study of scripture, the fifth year, &c. the passage in question has the same foundation. But for one not so desirous,—"after the eighth year, the adopter &c."..... 65 *e*

DATTAKA CHANDRIKA.—(In adoption) respect, should be shewn to the several principal seasons, for the performance of the Upanayana rites of the Khsatriya and the Vaicya respectively. For he only, to whom authority, produced in the principal season might have attached, is capable to perform such initiatory rite at a secondary season (if not qualified by the renewal of the ceremony of tonsure, preceded by a sacrifice for male issue). This was before declared. But in regard to tonsure, attention to the secondary season may be observed on account only of express passages of law..... 65 *e*

JAGANNADA.—II Dig p 393. The adoption of a child taken at the age of five years, but for whom tonsure and other ceremonies were afterwards performed under the family name of his natural father, would be nevertheless valid: for the ceremony of tonsure performed under the family name of his natural father is void, because he did not then belong to that family; and because the ceremony is performed by one who had no right to do so, since he truly became son of the adopter, and certainly belonged to his family, not having been already initiated under the family-name of his natural father when the adoption took place. It should not be objected, that, were it so, the text of the Calicapurana (C L XXXII 1) would be unmeaning. That text is only intended to invalidate the adoption of a boy for whom the ceremony of tonsure had been performed within the third year, and who is afterwards accepted for adoption within his fifth year. In this case, whose son does he become? He becomes the slave of the person who accepted him for adoption.

Page.

On this subject it is said, the inference ought to be deemed admissible; for the ceremony of tonsure thus performed is void, and a repetition of it is needed: but that cannot take place, since there is no person capable of performing it, because he is not truly son of either; for you must affirm, that, by the relinquishment of the giver, the boy ceased to be his son, or to belong to his family, and that his affiliation is void. It should not be objected, that the text of the Calicapurana (C L XXX II 2) would be unmeaning. It is intended to confirm the sense of the preceding verse (C L XXXII 1) A boy therefore, being accepted under the age of five years, is in law a true son of the adopter, even though the ceremony of tonsure have not been performed. Accordingly, if his filiation were incomplete until his marriage, which is included in the term "and the like" (C L XXXII 2), he might espouse a damsel related to the adopter, within the degree of a Sapinda; and the affiliation of one whose marriage happens not to take place, would be void; and tonsure and other ceremonies for men of the servile class, being optional, if these be not performed, the adoption would be invalid: these and other difficulties are obviated; for the implied object is to except one for whom the ceremony of tonsure has been performed under the family name of the natural father.

It should be here remarked, that no law is found expressing that a son shall not be adopted by one who has not contracted a marriage; nor any law, that a boy, known by his family-name to be of the same primitive stock, shall not be adopted. But, in fact, if the adopter wilfully omit any of the ceremonies, either that tonsure, or any other which is ordained for his class, the boy becomes a slave; if the adopter die, while disposed to perform those ceremonies on a day subsequent to acceptance, the adoption is nevertheless valid: that disposition must be understood to be an intention which may be expressed in these words, "I will perform them." This should be admitted as a rational interpretation; else, his affiliation being imperfect when such an adopter died, the estate would be taken by a brother's son; afterwards, when the affiliation was perfected by tonsure subsequently performed by the kinsmen; the son would be destitute of property, or, being then unconcerned with mourning, he might himself cause the ceremony of tonsure to be performed, and this becoming a true son, present fire to the funeral pile of the deceased, which would be inconsistent with common sense..... 65 *f*

Vide 65 *e*

DATTAKA MIMANSA.—If this is the case, then the passage should only recite,—"Having taken one initiated (unto tonsure inclusive.") What occasion is there, to use the expression, "a boy five years old?" Should this be objected, it is erroneous; for, the passage intends this restriction—'a boy five years old only (i e under six'): and the restriction, is for the sake of securing, an investiture of the characteristic

Page.

thread, conductive to the holiness, resulting from the study of scripture, which is preceded by the previous acquisition of letters..... 65 *g*

Vide Menu in 65 *c* and *d* and

Datta Chandrika in 65 *d*

MENU.—142. A given son must never claim the family and estate but of his natural father: the funeral cake follows the family and estate, but of him, who has given away his son, the funeral oblation is extinct. 65 *h*

Do. ..... 100 *a*
Do. ..... 100 *b*
Do. ..... 101 *b*
Do. ..... 101 *d*

MENU.—These eleven sons (the son of the wife and the rest as enumerated) are allowed by wise legislators to be substitutes in order for sons of the body, for the sake of preventing a failure of obsequies..... 65 *h*

DATTAKA MIMANSA.—For instance, the son of the wife, the son of appointed daughter, the daughter appointed to be a son, the son of an unmarried daughter (kanina) the son of a twice married woman, the son received with a pregnant bride the son of hidden origin, are principal substitutes, as partaking partially of portions (of the pair) from their kindred, in some instances, to their mother only, and in others in a small degree, to both parents. The son given, the son bought, the son made, the son self-given (Dattatma) and the son rejected, are substitutes in virtue of express texts of Law. Now the term 'substitute' is applicable to both classes even, by reason of its frequent use (in such general sense); in the same manner as in the passage, "He places Bricks (Srishti") the term "Srishti" (intends bricks generally.)..... 65 *h*

DATTAKA CHANDRIKA—VRIHASPATI.—"A substitute." Now such is of eleven descriptions, the son of the wife and the rest. Thus Menu (ordains): Sages declare these eleven sons (the son of the wife and the rest) as specified to be substitutes for the real legimate son; for the sake of preventing a failure of obsequies" Vrihaspati also. Of the thirteen sons who have been enumerated, by Menu in their order, the legitimate son and appointed daughter are the cause of lineage. As oil is substituted by the virtuous for liquid butter: so are eleven sons by adoption substituted for the legitimate son and appointed daughter.. 65 *h*

DATTAKA CHANDRIKA.—Of these however in the present age, all are not recognised. For a text recites:—"Sons of many descriptions who were made by ancient saints cannot now be adopted by men, by reason of their deficiency of power;" and against those other than the son given, being substitutes, there is a prohibition in a passage of law wherein after having been premised. "The adoption, as sons of those other than the legitimate son and son given" it is subjoined. "These rules sages pronounce to be avoided in the kali age."..... 65 *h*

Page.

MENU.—She, who is not descended from his paternal or maternal ancestors, within the sixth degree, and who is not known by her family name to be of the same primitive stock with his father or mother, is eligible by a twice-born man for nuptials and holy union..... 66 *a*

DATTAKA CHANDRIKA 7 to 9.—7 But, since the extinction of his relation by oblations of food in the family of the natural father is shewn, the marriage of an absolutely adopted son, might take place therein; and the marriage of a Duyamushyana with the issue of a female removed in relation more than three degrees would be proper..... 66 *a*

DATTAKA CHANDRIKA.—8. It is not so; for in the text of Menu, subjoined of which (on account of the conjunctive particle 'and') the construction is 'who is not connected as Sapinda, to his father (as well as mother,') the term 'father' is used to exclude (from marriage,) a female related as Sapinda to and belonging to the general family of the natural father also of an adopted son, although exclusively belonging to the family of his adoptive father. She who is not connected as "Sapinda to his mother and father, and not belonging to the general family of either, is approved amongst twice-born men for espousal and connubial intercourse."..... 66 *a*

DATTAKA CHANDRIKA.—9. Nor must it be argued that, still, where the father of the adopted son, might himself be an adopted son, there would be no reason barring the marriage with a female removed in relation to such father beyond the third degree; since her relation as Sapinda to, and being of the general family of the father are wanting. Because, the relation of Sapinda in question does not apply to marriage: but is an universal relation of that denomination pre-defined as extending to the seventh degree in the line of the father and to the fifth, in that of the maternal grand-father. Thus there is no inconsistency. These several descriptions of relations of Sapinda will be enlarged on in their appropriate places respectively.

DATTAKA MIMANSA PRAYAGAPARIJATA.—But would not thus, the law as to the son given, and the rest, being 'Duyamushyanas,' (or son of two fathers) be contradicted? Accordingly, there is this passage of law, in the Prayagaparijata. "Sons given, purchased, and the rest, are sons of two fathers. Their marriage may not take place in either family; as was the case of Cringa and Caisira."..... 66 *a*

DATTAKA MIMANSA 10 & 11.

VRHAT MENU AND GAUTAMA.—10. The relation as sapinda of sons given, purchased and the rest to the natural parent continues: by gift, and

Page.

so forth, even that does not fail : for by reason of consisting in connection through containing portions (of the natural father), it is not possibly to be removed while the body lasts. By this it is declared that the relation of sapinda in question is the consanguineal connection only and not connection by the ' pinda' or funeral cake ; for that this latter is barred is shewn by this passage,—" Of him who has given away his son the obsequies fail". Anticipating a question as to the extent of this relation as sapinda, the author adds, " Extending to the fifth and to the seventh degree &c." The meaning is this : ' Extending to the fifth degree'—completing five, that is embracing, five degrees. So of the expression ' to the seventh degree.'..... 66 *a*

Do. ..... 66 b

DATTAKA MIMANSA.—Gautama also, " With the kinsmen on the side of the father (viz of the procreator) beyond the seventh degree; and with those on the mother's side beyond the fifth &c."..... 66 *a*

VYAVAHARA MAYUKA.—This must be considered. Because, though the phrase ' simple adopted' is certainly no where mentioned, still, however, this (meaning) satisfactorily results, even from the declaration of the entire cessation of the connexion with the real father and the rest, by the above recorded text of Menu C XIV. (para 21.) which prohibition does not apply in a Duyamushyana adoption. Further : A marriage in the family of the procreator (Viji) within seven degrees, which is altogether illegal according to the text of Gautama : " With the kinsmen on the side of the father, viz. of the procreator (Viji) beyond the fifth, &c." would be unmeaning in a Duyamushyana adoption, because the sapinda affinity (to the procreator) still exists therein (beyond that). Therefore, the term, ' simple adopted,' must necessarily be expressed, to make the same agree with that of the text, because of the declaration of the prohibition of the sapinda connexion..... 66 *a*

DATTAKA MIMANSA.—Accordingly, the brother, paternal and maternal uncles, the daughter's son, and that of the sister, are excluded : for they bear not resemblance to a son..... 66 *b*

Do. ..... 67 *c*

Do. ..... 68 *c*

DATTAKA MIMANSA.—In the same manner as in the above text of the Grihyaparisishta on marriage, prohibited connection, in the case of marriage, is excepted ; so, in the case in question, (one, who, if begotten by the adopter, would have been the son of) a prohibited connection, must be excepted, in other words, such person is to be adopted,

Page.

as with the mother of whom the adopter might have carnal knowledge..... 66 *b*

Do. ..... 67 *b*
Do. ..... 68 *b*
Do. ..... 69 *a*
Do. ..... 70 *a*
Do. ..... 70 *b*

DATTAKA MIMANSA.—But although by the text of Menu, connection to the family of the natural parent is annulled: what proof is there as to the connection to the family of the adopter being established? on this point Vrhat Menu declares, "son given, purchased and the rest retain relation of Sapinda to the natural father as extending to the fifth and seventh degrees; like this general family, (which is) also that of their adopter."..... 66 *b*

DATTAKA MIMANSA.—In this text, the state of brothers, as adoptive fathers, being propounded, their incapacity to be the objects of adoption follows..... 66 *b*

Do. ..... 67 *a*

Vide 62 *c*

DATTAKA MIMANSA CAUNAKA.—"Having taken him by both hands, with the recitation of the prayer, commencing,—devasyatva &c," having inaudibly repeated the mystical invocation. "Augadangat &c," having kissed the forehead of the child: having adorned with cloths, and so forth, the boy, bearing the reflection of a son:..... 67 *b*

DATTAKA MIMANSA.—('The reflection of a son.') The resemblance of a son, and that is, the capability to have sprung from (the adopter) himself, through an appointment (to raise issue on another's wife), and so forth; as (is the case) of the son, of a brother, a near or distant kinsman, and so forth. Nor is such appointment of one unconnected impossible; for, the invitation of such (to raise issue) may take place under this text: "For the sake of seed, let some Brahmana be invited by wealth, &c."..... 67 *b*

Do. ..... 68 *b*
Do. ..... 68 *c*
Do. ..... 69 *a*
Do. ..... 70 *a*
Do. ..... 70 *b*

Vide 66 *b*

DATTAKA CHANDRIKA.—'Reflection of a son.' The resemblance of a son, or in other words, the capability to have been begotten, by the adopter, through appointment, and so forth,..... 67 *b*

Page.

DATTAKA CHANDRIKA.—"Except a daughter's son and a sister's son." This prohibition against the daughter's son and sister's son, refers to those other than Cudras. Accordingly Caunaka. Of Kshatriyas in their own class positively, and (on default of a sapinda kinsman) even in the general family, following the same primitive spiritual guide (Guru). Of Vaicyas, from amongst those of the Vaicya class: of Cudras from amongst those of the Cudra class: of all and the tribes likewise in (their own) classes only and not otherwise. But a daughter's son, and a sister's son are affiliated by Cudras. For the three superior tribes, a sister's son is no where (mentioned as) a son." 67 *c*

Do. ..... 68 *c*

Do. ..... 68 *d*

Do. ..... 69 *b*

Do. ..... 69 *c*

Vide 66 *b*

VYAVAHARA MAYUKA.—"The adoption of a son, by any Brahman, must be made from amongst sapindas, or kinsmen connected by an oblation of food; or on failure of these, and a sapinda, or one not so connected, may be adopted: otherwise, let him not adopt. "Of Kshatriyas, in their own class positively: and (on default of a sapinda kinsman) even in the general family, following the same primitive spiritual guide (Guru). Of Vaicyas from amongst those of the Vaicya class (Vaicyajateshu: of Cudras from amongst those of the Cudra class. Of all, and the tribes likewise, in (their own) classes only: and not otherwise. But a daughter's son, and a sister's son are affiliated by Cudras. "By no man, having an only son (ekaputra) is the gift of a son to be ever made. By a man having several sons (bahuputra) such gift is to be made, on account of difficulty (prayatnatas). "Let the best of the regenerate (the Brahman) to the extent of his ability, bestow a gratuity on the officiating priest. A king (kshatriya, the produce of) half even of his dominion: next in order a Vaicya three hundred pieces, a Cudra the whole even of his property: if indigent, to the extent of his means." Bearing the reflection, equal to (or like)..... 67 *c*

Do. ..... 68 *d*

Do. ..... 69 *b*

Do. ..... 73 *a*

VYAVAHARA MAYUKA.—A daughter's son and a sister's son: Now, as in the instance of the stick, in the formula: ("The sacrificer yajman) delivers the stick to (the Brahman, who personates). Maitra Varuna," though the stick (really) be the object required, from the necessity of its previous existence, still by the use of the

Page.

fourth case (to), Maitra Varuna is alone denoted as the object as is the most fit, from his act of uttering the summons in the formula: "The holder of the stick (he who personates Maitra Varuna) then utters the invocations (to the deities, for their presence in the sacrifice"). Even so, in this place, since the state of non-release from debt (results from want of a son), and because the sixth case (of Cudras in the text) has the sense of the fourth (to or for), therefore both the daughter's and the sister's son alone are to be admitted for Cudras, as the means (of relieving the father from debt), so by the propriety of only these two, the purport of the restriction of the rule is declared: thus, "the daughter's son and the sister's son alone are for Cudras." But if the impossibility of it for Cudras (be urged) by reason of the impropriety of the restriction, (I answer), they are both exhibited by the texts as the object for Cudras alone since it would be absurd to make the restriction apply to the agent (purisaukhya) in respect to Brahmans and the rest..... 67 *c*

MENU.—'If among several brothers of the whole blood, one have a son born, Menu pronounces them all fathers of a male child by means of that son; so that, if such nephew would be the heir, the uncles have no power to adopt sons..... 68 *a*

DATTAKA MIMANSA.—Hence it is a settled point, that amongst near "sapinda," kinsmen of the same general family, a brother's son only must be affiliated: and therefore, by being adopted (the brother's son, and other kinsmen,) are first in participating in the estate, and funeral oblations: but, not being adopted, they hold their respective places (in the order of heirs)..... 68 *a*

DATTAKA CHANDRIKA.—In respect however to this subject (it is to be observed that) where a brother's son may exist amongst near kinsmen, he only is to be adopted. This Menu ordains; "If one among brothers of the whole blood be possessed of male issue, Menu pronounces that they all are fathers of the same by means of that son." Vrishaspati (also). "If there are several brothers, the sons of one man by the same mother, on a son being born to one even of them, all of them are declared to be fathers of male issue." Under these two texts if a brother's son is in any manner capable of being a substitute, it is inferred that another is not to be adopted..... 68 *a*

DATTAKA CHANDRIKA.—This is not to be argued; for although, by reason of the nephew's possessing the representation of the filial relation, he may be the means of procuring exemption from exclusion from heaven and so forth: still, as the celebration of name and the due perpetuation of lineage would not be attained, for the sake of the same, the constituting him (an adopted son,) is indispensable. Besides the two texts in

Page.

question do not prohibit, where a brother's son may exist, the constituting (him or another) as son given and so forth: but indicate (as inherent in a nephew) the virtue of a son consisting in the capacity to perform the funeral repast and so forth. For otherwise a contradiction of the rule for the production of a kshetraja son, notwithstanding a brother's son may exist would follow; and since by the text subjoined, the resemblance of a son's son obtains in a daughter's son, according to the reasoning recited, the non-adoption of a son given, and the rest where a daughter's son also might exist would result. "By that male child, whom a daughter whether formally appointed or not, shall produce from a husband of a equal class, the maternal grand-father becomes the grandsire of a son's son: let that son give the funeral oblation, and possess the inheritance." ..... 68 *a*

Do. ..... 70 *a*

MITACSHARA.—Vide 70 *g*

Do. ..... 68 *a*

MENU.—1. Let the twice-born man espouse a wife of the same class with himself, and endued with the marks of excellence.

2. She who is not descended from his paternal or maternal ancestors within the sixth degree, and who is not known by her family name to be of the same primitive stock with his father or mother, is eligible by a twice-born man for nuptials and holy union.

3. In connecting himself with a wife, let him studiously avoid the ten following families, be they ever so great, or ever so rich in kine, goats, sheep, gold, and grain.

4. The family which has omitted prescribed acts of religion; that which has produced no male children; that in which the veda has not been read, that which has thick hair on the body; and those which have been subject to hemorrhoids, phthisis, to dyspepsia, to epilepsy, to leprosy, and to elephantiasis.

5. Let him not marry a girl with reddish hair, nor with any deformed limb, nor one troubled with habitual sickness; nor one, either with no hair, or with too much; nor one immoderately talkative, nor one with inflamed eyes.

6. Nor one with the name of a constellation, of a tree, or of a river, of a barbarous nation, or of a mountain; of a winged creature, a snake, or a slave; nor with any name raising an immage of terror.

7. Nor one very fat or very lean, or very tall or very short, nor one older than himself, nor one wanting a limb, nor one prone to theft or contention.

Page.

8. Let him choose, for his wife, a girl whose form has no defect; who has an agreeable name; who walks gracefully like a phenicopteras or a young elephant, whose hair and teeth are moderate respectively in quantity and in size, whose body has exquisite softness.

9. Her who has no brother, or whose father is not well known, let no sensible man espouse, through fear lest, in the former case, her father should take her first son as his own to perform his obsequies; or in the second case, lest an illicit marriage should be contracted..... 68 *b*

Do. ..... 69 *a*
Do. ..... 70 *a*
Do. ..... 70 *b*

Vide Dattaka Mimansa in 66 *b* and 67 *b*

DATTAKA MIMANSA VRDHA & GAUTAMA.—(Brothers) From the masculine gender being used, it results that brothers, and sisters also, of the whole blood, are not reciprocally the adoptive parents of the son (of any one of them and this conclusion is confirmed by the mention of two terms) (in that gender) Vridda Gautama, declares the same. "In the three superior tribes, a sister's son, is now here (mentioned as) a son."..... 68 *c*

Do. ..... 69 *c*
Do. ..... 69 *b*

DATTAKA MIMANSA.—If no brother's son exist, another even, being the nearest relative, according to the mode mentioned (must be adopted.) Conformably Caunakha (continues) "Of Kshatriya, in their own class positively: and (on default of a sapinda kinsmen) even in the general family, following in the same primitive spiritual guide (Guru) of Vaicyas, from amongst those of the Vaicya class (Vaecya-jateshu;) of Cudras from amongst those of the Cudra class. Of all, and the tribes likewise, (in their own) classes only: and not otherwise. But a daughter's son, and a sister's son, are affiliated by Cudras. For the three superior tribes, a sister's son, is no where (mentioned as) a son." 68 *c*

Do. ..... 68 *d*
Do. ..... 69 *b*
Do. ..... 69 *c*

DATTAKA MIMANSA CAKALA.—Cakala has clearly laid down the above points: "Let one of a regenerate tribe destitute of male issue, on that account, adopt as a son, the offspring of a sapinda relation particularly: or also next to him, one born in the same general family: if such exist not, let him adopt one born in another family, except a daughter's son, a sister's son and the son of the mother's sister."..... 68 *c*

Do. ..... 69 *c*

Page.

Vide Dattaka Chandrika in 67 *c* .

DATTAKA MIMANSA CAUNAKA.—Since the filial relation of a sister's son to one of the three first tribes, is not exhibited in any authority whatever, the passage is relative only to Cudras. This is the meaning of the whole..... 68 *d*

VYAVAHARA MAYUKA.—Therefore the daughter's son, and sister's son even, are the most proper for Cudras: In default of them, another also (may be adopted), if of similar class, as declared by the same author (para 9): "Of Cudras form amongst those of the Cudra class." This word, class, is not (necessarily) implied, by its connexion with daughter's son and sister's son, alone, for there is no (necessary) mutual connexion between the states: of daughter's son, sister's son, and common caste: And there is a risk of our (thereby) making an absurdity of parallel passages of the same author. This is fully explained by my father in his Davita Nirnaya, and the same is the rule (a chara) ordained by sages..... 68 *d*

Do. ..... 69 *b*

Vide 67 *c* and 68 *c*

MITAKSHARA.—Rudrudhara in the Cuddiviveka. 17.

17. The son made (kritrima) is one adopted by the person himself, who is desirous of male issue; being enticed by the show of money and land, and being an orphan without father or mother: for, if they be living, he is subject to their control..... 70 *d*

Do. ..... 70 *f*

NOTE 17.—(The son made) one bereft of father and mother and belonging to the same tribe with the adopter, and by him adopted, being enticed to acquiesce by the show of wealth, is a son made by adoption. Vicnecvara in the Madana-Parijata.

The form, to be observed, is this. At an auspicious time, the adopter of a son, having bathed, addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel says: "Be my son." He replies, "I am become thy son." The giving of some chattel to him arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite; and a set form of speech is not essential. Rudrudhara in the cuddhiviveka..... 70 *d*

Do. ..... 70 *f*

BAUDHAYANA SUTRA.— W. and B. 14. p. 316.

He is called 'a son made' (Kritrima) whom a (man) himself makes (his son) with (the adopter's) consent (only) and who belongs to the same caste as the adopter..... 70 *d*

Vide Divita Nernaya entered in 59 *f* 70 *e*

NOTE.—XVI S. H. L. p. 676.

Valid without the observance of any particular form (p. 228.), In treating on the kritrima son, Rudra-dhara in the Sudhi-viveka "adds, "The form to be observed in this. At an auspicious "time, the adopter of a son having bathed addressing the "person to be adopted who has also bathed, and to whom he has "given some acceptable chattel, says: "Be my son," He replies. I "am become your son." The giving some chattel to him, rises merely "from custom. It is not necessary to the adoption. The assent of "both parties is the only requisite; and a set form of speech is not "essential."..... 70 *f*

Vide Note to Mit. Ch. I. 5 XI. 17 entered in 70 *d*

MITACSHARA.—The following passage of Menu, "If among several brothers of the whole blood, one have a son born, Menu pronounces them all fathers of male issue by means of that son," is intended to forbid the adoption of others if a brother's son can possibly be adopted. It is not intended to declare him son of his uncle; for that is inconsistent with the subsequent text; "brothers likewise and their sons, gentiles cognates &c."..... 70 *g*

NOTE XV. S. H. L. p. 676.

The adoption of a kritrima son being, &c. (p 228). The adoption of a kritrima son is chiefly prevalent in the Mitthila country; and is rarely practised in other parts of India. "The "practice (says Mr. Colebrooke) of adopting sons given by their "parents, was there abolished by Cri-Datta and Pratihasta; although "the latter had been himself adopted in that maner. Their motive "was, lest a child already registered in one family, being again re-"gistered in another, a confusion of families and names should "thence ensue. A son adopted in the form so briefly noticed in the "present section, does not lose his claim to his own family, nor as-"sume the surname of his adoptive father: he merely performs obse-"quies and takes the inheritance." The translator is informed that Cri-Datta and Pratihasta have not abolished the practice noticed in their written works. A case of the nature alluded to had occurred; in consequence, a general assembly of Brahmans was held, at which the celebrated Pundits mentioned, and it was there agreed, that for the future the practice of the Dattaka adoption should be discontinued. But though this mode of adoption does not accordingly now prevail in the Mitthila country, unforbidden as it is by Vachaspati-Miçra, and the best writers there current, it is not to be inferred, that if in any case preferred such mode of affiliation would be illegal..... 71 *a*

Page.

DATTAKA MIMANSA.—And hence, from the sanction of the gift, of an only son even, in the present case, there is no room, for the application of the prohibition, ("Let no man give or accept as only son &c.") For, since, as propounded in the sequel of this text, assigning the reason ("For he is (destined) to continue the line of his ancestors,") the continuation, of the line of his ancestors (the father, and the rest,) is completed, by means of a son, although common to two brothers: it is established, that the prohibition in question, refers to persons, other than brothers..... 71 *b*

Do. ..... 73 *a*

DATTAKA CHANDRIKA.—Should this be alleged, it is not accurate. For, the text in question is applicable to a case, other than that of the Duyamushyana, or son of two fathers. In the case of the Duyamushyayana the extinction of lineage, contemplated in the clause of the text, containing the reason, would not take place: and an indication found in the Puranas, as to the affiliation, by Vetalas, of the son as (his brother) Bhairava. Thus, "Accordingly he, (Bhairava) at some time copulated with Urvasi, a celestial nymph, and procreated on her a son named Suvesa-Vetala also affiliated him, as his son; and in consequence by means of this son, both attained heavenly salvation..... 71 *b*

Do. ..... 73 *a*

DATTAKA MIMANSA.—Next in reply to the question, as to the qualification of the person to be affiliated, Canuka, declares: "By no man, having an only son (eka-putra,) is the gift, of a son, to be even made. By a man having several sons (buhu-putra) such gift, is to be made on account of difficulty (prayatnatas.")..... 73 *a*

DATTAKA MIMANSA.—('Ever') in a time of calamity: accordingly, Nareda says: "A deposit, a son, and a wife, the whole estate of a man,) who has issue living; the sages have declared unalienable, even by a man oppressed by grievous calamities: although the property be solely that of the man himself." This text also regarded an only son; for it is declaratory of the same import as the texts of Cannaka and Vasishtha..... 73 *a*

DATTAKA CHANDRIKA.—In answer to the question by whom is a son to be given? Cannaka declares: "By no man, having an only son is the gift of a son to be ever made. By a man having several sons, such gift is to be anxiously made."..... 73 *a*

MITACSHARA.—So an only son must not be given (nor accepted) For Vasishtha ordains "Let no man give or accept an only son."..... 73 *a*

APASTHUMBA SUTRA.—11. And Haridattas comment thereon (1) W and B p 306.

Page.

The gift (or acceptance of a son) and the right to sell (or buy) a child is not recognised..... 73 *a*

HARIDATTAS' COMMENT.—Note. Haridatta states that these are the sentiments of a husband whose wife had been negligently watched, and therefore became unfaithful, uttered when he received the decision that the son begotten on his wife belonged "to the giver of the seed." According to him these verses do not prohibit the appointment (niyoga) of a wife or widow.

As according to this Sutra the sons adopted or bought would be forbidden, Haridatta thinks that it refers either only to eldest son, or to the right of women to give or accept sons. But the twelve kinds of sons who are known to other lawyers are no where mentioned by Apastamba..... 73 *a*

Vide Vasishta in 62 *c*

„ Datta Mimansa in 71 *b*

„ Vyavahara Mayuka in 67 *c*

MITACSHARA.—Nor, though a numerous progeny exist, should an eldest son be given; for he chiefly fulfils the office of a son; as is shown by the following text, "By the eldest son as soon as born, a man becomes the father of male issue." (*a*)..... 75 *a*

MENU.—106 & 107.

By the eldest, at the moment of his birth, the father, having begotten a son, discharges his debt to his own progenitors; the eldest son, therefore, ought before partition to manage the whole patrimony..... 75 *a*

MENU.—That son alone, by whose birth he discharges his debts, and through whom he attains immortality, was begotten from a sense of duty: all the rest are considered by the wise as begotten from love of pleasure..... 75 *a*

Vide Dattaka Chandrika in 65 *g*..... 76 *a*

VYAVAHARA MAYUKA.—The unremote kinsman, means in each case, the Sapinda nearest (to the adopted) among whom again, the nearest of all is the brother's son; for "If among several brothers of the whole blood, one of them have a son born, Menu pronounces them all fathers of a male child by means of that son." And the Mitacshara has the same. And this must be the proper motive of that precept: for it is impossible there can be any other. The remote kinsman, means 'one of another caste'. And my father has said that; "A married man, who has even had a son born, may become an adopted son." This also is reasonable, for it is not in opposition (to other maxims.)..... 76 *b*

Page.

MITACSHARA.—Of these (two descriptions of offspring) the impotent man may have that termed issue of the wife; the rest may have legitimate progeny likewise. The specific mention of "legitimate" issue and "offspring of the wife" is intended to forbid the adoption of other sons. 76 *c*

DATTAKA CHANDRIKA.—As sons blind, lame, and so forth do not inherit and since it is ordained that their legitimate son and son of the wife only participate in the estate of the paternal grand-father; a son given, or other description of son, adopted by such persons, have no right to the estate of the paternal grand-father; but to maintenance only. For alimony being provided for the wives of persons blind and so forth, maintenance for their adopted sons is inferred à fortiori..... 76 *c*

MITACSHARA.—They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs is not deprived of his allotment..... 76 *d*

DATTAKA MIMANSA CAUNAKA.—A man destitute of a son (aputra,) is one, to whom no son, has been born, or whose son has died: for a text of Caunaka expresses, "One to whom no son has been born or whose son has died, having fasted for a son, &c." Another reading recites, "The impotent man or also one whose offspring has died..... 77 *a*

Do. ..... 77 *b*
Do. ..... 78 *a*
Do. ..... 78 *b*
Do. ..... 78 *c*

DATTAKA MIMANSA.—"By a man destitue of a son only." The incompetency of one having male issue is signified by the term "only" in this passage..... 77 *a*

Do. ..... 78 *a*
Do. ..... 78 *c*
Do. ..... 95 *c*

DATTAKA MIMANSA.—"By a man destitute of a son." The word son here used is inclusive also of the son's son and grandson, for (through these) the exclusion from heaven, denounced in such passages as "Heaven awaits not one destitute of a son" is removed: since it is declared in the text subjoined, that the mansions of the happy are attained through the grandson and the other. "By a son, a man conquers worlds: by a son's son, he enjoys immortality: and afterwards by the son of a grandson, he reaches the solar abode."..... 77 *a*

Do. ..... 78 *a*
Do. ..... 78 *c*

Vide Dattaka Mimansa in 58 *a*

Page.

JAGANNATHA.—II. Dig. 3. p. 394.

It should not be argued, that one who has no wife, being consequently excluded from the order of a householder, cannot properly adopt a son, this being an act mentioned when treating of the order of a housekeeper or married man. There is no argument to support such an induction. Accordingly, it is recorded in the Bharata, that Pandu, having gone to the forest with his wife, adopted sons begotten on her by strangers; and it is recorded, that Vyasa and others, who had contracted no marriages, nevertheless obtained sons, namely Sucadéva and others. He who happens to have no wife, (whether he have contracted no marriage, or his wife have died or be forsaken by him,) either has not completed the ceremonies which perfect twice-born men, or belongs to no order; but it is contrary to common sense that, although the form of adopting a son given have been observed, the adoption should be void..... 77 *a*

DATTAKA CHANDRIKA.—"By a man destitute of male issue:" that is; by one to whom no son may have been born: or whose son may have died; for, a text of Caunaka expresses; "One destitute of a son or one whose son may have died, having fasted for male issue."..... 77 *b*

Do. ..... 95 *c*

Vide Dattaka Mimansa and Sayannadais 77 *h*

DATTAKA MIMANSA.—10. As for the instance, appearing, of the adoption as sons of Devarata, and the rest by Vicvamitra, and others, although possessing male issue: that from its repugnancy to the revealed law, as contained in passages before quoted must be understood, (in the same manner as the eating the haunch of a dog, and so forth) not to imply the existence of a revelation (authorizing the act.)..... 78 *a*

Do. ..... 81 *e*

DATTAKA CHANDRIKA.—Therefore, although by the production of a son, the exemption from debt, deduced from the text of Menu subjoined may have taken place; still on the death of such son for the sake of funeral rites the affiliation of another son is indispensable. "By the eldest, at the moment of birth a man becomes father of male issue, and absolved also from debt to his progenitors. He therefore is entitled to take the estate."..... 78 *a*

Do. ..... 78 *b*

Do. ..... 78 *c*

DATTAKA CHANDRIKA.—The term "male issue," (putra) here used, is illustrative of the grandson, and great-grandson; for these equally present oblations of food, and preserve the line. Otherwise, it would follow that the adoption of a son, by one whose son had died, notwithstanding the existence of a grandson, were without reason.

Page.

It therefore results that one only destitute of a grandson and great-grandson may adopt..... 78 *a*

Do. ..... 78 *c*

Do. ..... 83 *b*

Vide Dattaka Mimansa 3 58 *a*

Do. 4 and 6 77 *a*

Do. 9 58 *a*

Do. 13 77 *a*

MITACSHARA.—9. He, who is given by his mother with her husband's consent, while her husband is absent (or incapable though present) or (without his assent)after her husband's decease, or who is given by his father, or by both being of the same class with the person to whom he is given, becomes his given son (dattaka.) So Menu declares: "He is called a son given (dattrima) whom his father or mother affectionately gives as a son..... 83 *a*

Dattaka Mimansa S. I. 4 in 77 *a*..... 78 *b*

Vasishta II. Dig. B. V. Ch. IV. S. VIII 273 in 62 *d*..... 78 *b*

Dattaka Mimansa S. I. 3 in 58 *a*..... 78 *b*

„ S. I. 4 in 77 *b*..... 78 *b*

„ S. I. 6 in 77 *a*..... 78 *b*

„ S. I. 9 in 58 *a*..... 78 *b*

„ S. I. 13 in 77 *a*..... 78 *b*

„ S. I. 18 in 62 *a*..... 78 *b*

Vasistha II. Dig. B. V. Ch. IV. S. VIII. 273 in 62 *a*..... 81 *a*

Dattaka Chandrika S. I. 24 in 62 *d*..... 81 *b*

Dattaka Mimansa S. I. 3 in 58 *a*..... 81 *c*

Do. Do. 9 do 58 *a*.....81 *c* and *d*

Dattaka Chandrika S. I. 24 in 62 *d*..... 81 *e*

Dattaka Mimansa S. I. 10 in 78 *a*..... 81 *e*

Do. Do. S I. 3 in 58 *a*..... 83 *b*

Dattaka Chandrika S. I. 6 in 78 *a*..... 83 *b*

Virashpati II. Dig. B. V. Ch. IV. 279 in 59 *e*..... 83 *c*

Adityapurana Do. Do. 280 in 59 *e*..... 83 *c*

Dattaka Mimansa S. II. 64 in 59 *e*..... 83 *c*

MADAVYA.—32. The texts which go to prove that the other substitute sons besides the Datta share in the inheritance, refer to some other age of the world; because it is prohibited in another Smirti to receive them as sons in the Kali age: "The receiving of others than the Datta and Aurasa as sons, the begetting of offspring by a brother-in-law and retiring to the forest, all these practices the wise have said should be avoided in the Kali age..... 83 *c*

SMRITI CHANDRIKA.—The appointment of a daughter to raise up a son to her father must also be considered by the same text to be prohibited in the Kali age, such a son not being either one of the body or adopted. The conlusion hence is that, in the Kali age in default of a legi-

Page.
timate son or grandson, the adopted son alone and none else is recognised as a subsidiary son..... 83 *c*

NOTE. TO MITACSHARA.—Ch. I S. XI 9.

(He, who is given by his mother with her husband's consent) Vasishta says: "Let not a woman either give or accept a son, unless with the assent of her husband." He had before said "Man proceeds from virile seed and uterine blood, proceeds from his father and his mother, as an effect from its cause. Therefore both his father and his mother have power to give, to sell, or to abandon their son."

Concerning the mother's authority to give away her son, when she is a widow, see a subsequent note. In regard to a widow's power of adopting a son, there is much diversity of opinions. Vachispati-Micra, who is followed by the Mitthila school, maintains that neither a woman, nor a Cudra, can adopt a dattaka or given son; because the prescribed ceremony (§ 13) includes a sacrifice, which they are incapable of performing. This difficulty may be obviated by admitting a substitute for the performance of that ceremony; and accordingly adoption by a woman, under an authority from her husband, is allowed by writers of the other schools of law. Nandapundita, however, in his treaties on adoption, restricts this to the case of a woman whose husband is living, since a widow cannot, he observes, have her husband's sanction to the acceptance of a son. On the other hand, Balam-bhatta contends that a woman's right of adopting, as well as of giving a son, is common to the widow and to the wife. This likewise is the opinion of the author of the Vyavahara Mayuka: but while he admits, that a widow may adopt a son without her husband's previous authority, he requires, that she should have the express sanction of his kindred. Writers of the Gauru school, on the contrary, insist on a formal permission from the husband declared in his life-time.

(Being of the same class with the person to whom he is given.) Or being given to a person of the same class. The two readings, (savarnaya in the dative, or savarnoyah in the nominative,) both noticed by the commentator Balam-bhatta, giving the same sense.

The adopted son must be of the same tribe with the given or natural parent as well as with the adoptive parent, according to the remark of Apararka cited with approbation by Nanda-pandita, in his treatise on adoption.

(Becomes his given son) The son given (dattaka or dattrima) is of two sorts; 1st simple, 2d son of two fathers (duyamushyayana). The first is one bestowed without any special compact; the last is one

Page.

given under an agreement to this effect "he shall belong to us both". Vyavahara Mayuka.

"Whom his father or mother gives" Midhatithi reads and interprets "whom his father and mother give," (inserting the conjunctive particle cha instead of the disjunctive va) Bulam-bhatta condemns that reading; and infers from the disjunctive particle and dual number in the text, that three cases are intended; viz 1st The mother may give her son for adoption with her husband's consent, if he be absent or incapable; and without it, if he be dead or the distress be urgent. 2d The father may give away his son without his wife's consent, if she be dead or insane, or otherwise incapable; but, with her consent, if she reside in her own father's house. 3d The father and mother may conjointly give away their son, if they be living together.

"Whom his father or mother affectionately gives." Amicably: not from avarice or intimidation. In the Viramitrodaya, the word is expressly stated to be used adverbially; but Balam-bhatta considers it as an epithet of the son to be adopted, and as implying, that the adoption is not to be made against his will or without his free consent.

("Being alike") This is interpreted by Medhatithi as signifying 'alike, not by tribe, but by qualities suitable to the family: accordingly a kshatriya, or a person of any other inferior class, may be the given son (dattaka) of a Brahmana.' Balam-bhatta and the author of the Mayuka censure this doctrine: since every other authority concurs in restricting adoption to the instance of a person of the same tribe..... 84 *a*

Do. ..... 85 *b*
Do. ..... 93 *b*

Vyavahara Mayuka.—Therefore, if there must be an order from the husband, it is for a married woman only, as above shewn, but, for a widow, even without it (adoption) may be made, with the permission of her father, or, on failure of him, of the relations (Nyati) under this precept: "Let a female be taken care of, by her father while a child, by her husband when married, and by her sons, in her old age. If none of these exist, let her other relations (Nyati) take care of her. A woman is never fit for independence." This has been declared by Yajnyawalkya only with reference to difference of age, and the circumstances of a woman being under the power of her husband. In case of being dead, or (unable) from old age, or other (disqualification) or from helplessness, then (she is) indeed under the power of her son or other relatives..... 84 *b*

Do. ..... 87 *b*
Do. ..... 88 *a*
Do. ..... 89 *a*

Page.

VYAVAHARA MAYUKA.—By Katyayana also it has been said. 2 "If a woman, without the orders of her father, husband, or son, should perform obsequies, such obsequies are of doubtful validity." What is here said of the orders of her father, husband &c. relates only to the difference of age. Obsequies here means, rites performed for the other world; wherefore, at whatever age a married woman may (require to) receive the command of her husband, that very command is in the case of a widow not required, since the command of any other person, not here mentioned is no where declared requisite. Therefore the right of adoption, even without the order of her (late) husband does pertain to a widow..... 86 *a*

Do. ..... 87 *a*

NOTE *(d)* also to Ch. IV S. IV 8.

This 'precept' does not appear to be in point; and so far as regards the widow the doctrine in support of which it is cited, seems questionable. It has however, been held in Bombay that a widow may adopt a son without the consent of her husband, if she have obtained permission of the caste and the sanction of the ruling powers. But under such circumstances she must adopt the next of kin to the deceased husband—his brother's son if such exist, Sree Brijhookunjee Maharaj v. Sree Gokoolootsaqjee Maharaj 1. Borr 181, Huchut Rao Mankun v. Govind Rao Bulwant Roa Munkur. 2 Borr. 75. So in Madras the Pundits have said, obiter, that a widow's adoption with the mere consent of her husband's relations would be valid; Ranee Sevagamy Nachiar v. Streemathoo Heraniah Gurbah. 1. Mad. Sel. Dec. 101, 104, and see M. S. D. 1849. p. 115, 117, and S. A. 156 of 1857 M. S. D. 1859. p. 5. Strange's Manual of Hidu Law 2nd ed. § 72; Gibelin E'tudes Surle Druit Civil des Hindous. 79. 94. 1 Strange H. L. 79 Colebrooke's note to Mitacshara, ch. I. S. XI, cl. 9. And see R. A. 35 of 1861, hord 19th December 1863 and repeated in 1 Madras. H. C. Rep. In Bengal the husband's assent seems indispensable, Macn. Prin. 68 Macno Cons. 195 3 Coleb. Dig. 242 and so held in a Benares case 2. S. D. A. 169 : Raja Haimun Chull Sing. v. Koomer Gunsheam Sing 2 Knapp P. C. 203. 221. Ed.

Do. ..... 87 *a*

VIRA MITRODAYA Suth :—Note. 6. Stokes, H. L. 673.

Though it is admitted by his sanction, she may affiliate on the part of her husband (*e* 222). On the subject of the adoption by a woman, this portion of a passage from Vasishta is usually cited. "Let not a woman either give or accept a son unless with the assent of her husband." Vachaspatimicra, in another work, the Cráddha-Chintamani, maintains that the cause, "unless with the assent of her husband," refers only to the gift, and not the adoption of a son, a woman, as well as a Cudra, from their inability to perform the sa-

Page.

crifice included in the prescribed ceremony, being both incapable of adopting a Dattaka or son given. In this opinion he is supported by Rudra-dara, the author of the Sudhi-Viveka, a work also current in Mitthila. Both authors have perhaps, from their silence, left it doubtful, whether they allow the adoption of a Kritrima son, (at which no sacrifice is performed,) through the delegated agency of a wife or not: it would however be difficult to show that such adoption were at variance with their express doctrines.—"This objection (says Mr. Colbrooke, in allusion to the opinion of Vachaspati-micra, just mentioned) may be obviated, by admitting a substitute, for the performance of that ceremony: and accordingly adoption by a woman, under authority from her husband, is allowed by writers of the other schools of law: Nanda pandita, however in his treatise on adoption, restricts this to the case of a woman, whose husband is living, since a widow cannot, he observes, have her husband's sanction to the acceptance of a son. On the other hand, Balam Bhatta, contends that a woman's right of adopting, as well as of giving a son is common to the widow and the wife. This is likewise the opinion of the author of Vyavahara Mayuka: but while he admits that a widow may adopt a son without her husband's previous authority, he requires that she should have the express sanction of his kindred. Writers of the Gaura school, on the contrary insist on a formal permission from the husband declared in his life-time." It may be added that the author of the Viramitrodaya concurs in the opinion of the Vyavahara Mayuka just noticed. Of these works the former is more particularly Current at Benares, and the latter among the Marattahs. Nanda Pandita has not omitted expressly to disallow the ability of kinsmen to authorize a widow to adopt..... 87 *b*

Vide Vyavahara Mayuka in..... 84 *b*

YAJNYAWALKYA.—Yajnyawalkya in the first chapter of his code let her father guard a maiden; let her husband guard a married woman; but let her son guard her in age: or, on failure of these, let their kinsman protect her. In no instance is the independence of a woman allowed..... 88 *a*

Vide 84 b.

Do. ..... 89 *a*

Do. ..... 84 *a*

VISHNU SUTRA. 28 to 31.

When the husband is deceased, his kin are the guardians of his childless widow; in disposing (of her) and in the care of her, as well as in her maintenance, they have full power..... 89 *a*

VISHNU SUTRA.—29. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations within the degree of a Sapinda. 89 *a*

Page.

VISHNU SUTRA.—30. Through independence women go to ruin, though they be born in a (noble) family, therefore the Lord of creatures ordained dependence for them..... 89 *a*

VISHNU SUTRA.—31. The father protects her during her childhood, her husband in her youth, her sons in her old age; a woman has no right to independence..... 89 *a*

DATTAKA CHANDRIKA.—Now, if there be no prohibition even there is assent: on acccount of the maxim; "The intention of another, not prohibited, is sanctioned." Yajnyawalkya suggests, the independency of the woman.

"He whom his father or mother gives is a son given."

Also, in another place; "deserted by his father and mother or either of them..... 89 *b*

Do. ..... 90 *a*

Do. ..... 95 *a*

Vide Vasishta in 62 *c*.

VISHNU SUTRA.—41. Amongst wivesof one husband also, the son of one is the son of all..... 93 *a*

Vide 62 *d*.

Vide 84 *a*

and Vasista in 62 *c*. 93 *b*

Vide Yajnyawalkya in 88 *a* 94 *a*.

Varista in 62 *d* 95 *a*.

Vide Dattaka Mimansa 1. 41 in 58 *a*.

Vide Dattaka Chandrika 1 52 in 89 *b*..... 95 *a*

DATTAKA MIMANSA.—Since by the verb 'be' (in the present tense) the actual existence, of the condition of possessing male issue, is declared; (the author) excludes such condition, as past and future; and hence, the benefit, mentioned, in such texts, as ("should the father see the face of a living son &c.") does not accrue to one brother, by the means of the deceased son of another; neither, in the expectation of an unborn son, (of a brother) must the adoption of another, be omitted..... 95 *b*

Dattaka Mimansa I. 3 in 58 *a*.

Dattaka Mimansa I. 6 and 9 in 77 *a*.

Dattaka Chandrika I. 4 in 77 *b*..... 95 *b*

MITACSHARA.—"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student on failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue. This rule extends to all (persons and) classes."..... 95 *d*

Do. ..... 100 *b*

Do. ..... 101 *a*

Page.

MITACSHARA.—He, who has no son of any among the twelve descriptions above stated (C. I. Sect II) is one having 'no male issue'. Of a man, thus leaving no male progeny, and going to heaven, or departing for another world, the heir, or successor, is that person, among such as have been here enumerated (viz. the wife and the rest,) who is next in order, on failure of the first mentioned respectively. Such is the construction of the sentence..... 95 *d*

Do. ..... 100 *b*

Do. ..... 101 *a*

MITACSHARA.—All, without exception, have a right of inheriting their father's estate, for want of a preferable son: since a subsequent passage ("Not brothers, nor parents, but sons, are heirs to the estate of the father," purposely affirms the succession of all subsidiary sons other than the true legitimate issue, and the right of the ligitimate son is propounded by a separate text ("The legitimate son is the sole heir of his father's estate,") and the word "heir" (dayada) is frequently used to signify any successor other than a son. 95 *d*

MENU.—On failure of the best, and of the next best among those twelve sons, let the inferior in order take the heritage, but, if there be many of equal rank, let all be sharers of the estate..... 95 *d*

MENU.—Not brothers, nor parents, but sons, if living, or their male issue, are heirs to the deceased, but of him, who leaves no son, nor a wife, nor a daughter, the father shall take the inheritance; and, if he leave neither father, nor mother, the brothers..... 95 d

DAYABHAGA.—They take the whole estate of a father, who has no legitimate issue by himself begotten; but; if there be a true son, such of them, as are of the same tribe with the father, take a third part..... 95 *d*

DAYABHAGA.—In regard to succession to the wealth of a deceased person, who leaves no male issue, authors disagree in consequence of finding contradictory passages of law..... 95 *d*

SMRITI CHANDRIKA.—The substance of the third quarter of the above text is explained by Devasvami as follows: "He, the adopted, takes the whole effects as well as the 'Gotra' of the adopter" it must therefore be concluded that, by the fact of adoption, the adopted acquires a right over the property of the individual who receives him, in adoption, and also gets his (adopter's) "Gotra" or family name. Likewise, the adoption severs the boy from his natural family and renders him no more the son of his natural father. He is hence excluded from the participation of the wealth of the person who gave him in adoption and also from bearing his family name..... 100 *a*

MADHAVYA.—Dattaka sons, &c. do not share in the wealth of their natural father, thus Menu says:—

Page.

"A Dattrima son may never share in the family or property of his natural father; the pinda follows the family and estate; the funeral offering departs from the giver (of a son") The mention of a Dattrima son is to include kritrimas &c..... 100 *a*

Vide Menu IX. 142 in 65 *g*.

DATTAKA MIMANSA.—6. and 7.

Menu next propounds another rule. "A given son must never claim the family and estate of his natural father. The funeral cake follows the family and estate; but of him who has given away his son the obsequies fail."..... 100 *b*

Do. ..... 100 *d*

DATTAKA MIMANSA.—7. The son given must never claim his natural father's family and estate. Thus, 'the obsequies' that is the funeral repast (which would have been) performed by the son given fails of him who has given away his son..... 100 *b*

Do. ..... 101 *d*

DATTAKA CHANDRIKA.—On the subject (of adoption) Menu says, "A given son must never claim the family and estate of his natural father. The funeral cake follows, the family and estate: but of him who has given away his son the obsequies fail."..... 100 *b*

Do. ..... 101 *d*

DATTAKA CHANDRIKA.—It is declared by this, that through the extinction of his filial relation from gift alone, the property of the son given in the estate of the giver ceases; and his relation to the family of that person is annulled..... 100 *b*

Do. ..... 101 *d*

VYAVAHARA MAYUKA.—The son given is of two sorts, first simple; second, son of two fathers (duyamushyayana) The first is one bestowed without any special compact; the last, is one given under an agreement to this effect, 'he shall belong to us both. Here the first will perform the funeral ceremony, and the other rites for the adopter only, as may thus (be demonstrated):—In the desire of accomplishing the acceptance of a son, by the term 'son' being in the second person, in the phrase, "being about to adopt a son" (para 16) and the like, detailing the rules for the ceremony, the production of a son is declared. And not that the adopter can possibly imagine, "his filial relationship is derived from any capacity of begetting. Therefore, from the word 'son,' after having instanced the whole duties of a son, we must admit the production of one, as far as requisite, and not previously existing. Hence, in the family of the acceptor the condition may (in this way) be brought about. From which result the acts suitable to the different relations, of son, father and the rest. Even as is de-

Page.

clared by Menu. A given son must never claim the family and estate of his natural father: the funeral oblation follows the family and estate, but of him who has given away his son, the obsequies fail.... 100 *b*

Do. ..... 101 *d*

VYAVAHARA MAYUKA.—From this also results, the establishment of the cessation of family connexion with the father's whole brother, and the rest. Therefore also, even the son begotten by the simple adopted son, shall perform (his father's) sapinda-karana, parvana obsequies, and the rest, in conjunction even with the (original) adoption. Even so, his son also..... 100 *b*

Vide Menu IX. 142 in 65 *g*.

Vide Mit. in 95 *d*—101 *a*

YAJNYAWALKYA.—The father being gone to a foreign country, or deceased naturally or civilly, or wholly immersed in vices, the sons, or their sons, must pay the debt; but, if disputed, it must be proved by witnesses..... 101 *b*

YAJNYAWALKYA.—He who has received the estate of a proprietor leaving no son capable of business, must pay the debts of the estate, or on failure of him, the person who takes the wife of the deceased: but not the son whose father's assets are held by another.

VRIHASPATI.—The father's debt must be first paid, and next a debt contracted by the man himself; but the debt of the paternal grandfather must even be placed before either of those..... 101 *b*

The sons must pay the debt of their father, (52) when proved, as if it were their own with interest; the son's son must pay the debt of his grand-father, but without interest; and his son, or the great grand son, shall not be compelled to discharge it, unless he be heir, and have assets..... 101 *b*

VRIHASPATI.—The succession to the estate is liable for the debt, if the son be involved in distress; but the person who takes the widow shall be liable for the debt, on failure of successors to the estate..... 101 *b*

VISHNU.—If he who contracted the debt should die, or become a religious anchoret, or remains abroad for twenty years, that debt shall be discharged by his sons or grandsons, but not by remoter descendants against their will..... 101 *b*

NAREDA.—A father being dead, his sons, whether after partition or before it, shall discharge his debt in proportion to their shares; or that son alone who has taken the burden upon himself (54)..... 101 *b*

NAREDA.—Of the successor to the estate, the guardian of the widow, and the son not competent to the management of affairs, he who takes the assets becomes liable for the debts; the son though

Page.

incompetent, must pay the debt, if there be no guardian of the widow, nor a successor to the estate, and the person who took the widow, if there be no successor to the estate, nor competent son. 101 *b*

KATYAYANA.—The Judge shall compel a son to pay the debt of his father; provided he be involved in no distress, be capable of property, and liable to bear the burden; but in no other case shall he compel the son to pay his father's debt.

.2. If the son be afflicted with disease, or under the age fit for business, and another person be found to have taken the assets, the Judge must enforce payment from him; or, on failure of such persons, from one who has taken the widow..... 101 *b*

MENU.—The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before described, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents are the six kinsmen and heirs..... 101 *b*

Vide Menu IX 142 in 65 *g*.

DATTAKA CHANDRIKA.—Therefore, by the same relationship of brother, and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsmen, where such son may not exist (the adopted son) takes the whole estate even..... 101 *c*

MITACSHARA.—Menu having premised, two sets of six sons declares the first six to be heirs and kinsmen; and the last to be not heirs but kinsmen: "The true legitimate issue, the son of a wife, a son given, and one made by adoption, (a) a son of concealed origin, and one rejected (by his parents,) are the six heirs and kinsmen. The son of an unmarried woman, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a Cudra woman, are six not heirs but kinsmen..... 101 *c*

MITACSHARA.—That must be expounded as siginifying, that the first six may take the heritage of their father's collateral kinsmen (sapindas and sumanodakas) if there be no nearer heir; but not so the last six. However consanguinity and the performance of the duty of offspring, libations of water and so forth, on account of relationship near or remote belong to both alike..... 101 *c*

MITACSHARA.—It must be so expounded; for the mention of a given son in the following passage is intended for any adopted or succedaneous son. "A given son must never claim the family and estate of his natural father (b). The funeral oblation follows the family and estate: but of him, who has given away his son, the obsequies fail." 101 *d*

Note XXI S. H. L. p. 678

Page.

DAVITA NIRNAYA OF VACHASPATI-MISRA.—Would not apply to the kritrima son as usually (p229). In the Davita Nirnaya Vachaspati-Misra declares, that no relation obtains between the kritrima adopted son and the father of the adopter. From which it is to be inferred, that such adopted son could not inherit of that person, and á fortiori from the collateral kinsman of the adopter. The same inference in fact results from the circumstance of the kritrima son in question, not being considered as a member of his adopter's family. It may however be concluded, that where the adopter might die in family co-parcenary with his father and brethren, his kritrima son would be entitled to receive on division his share..... 101 *c*

DATTAKA MIMANSA.—Baudhayana, propounds a particular rule, for those following the Taittiri portion, of the Vedas; "We are about to explain the mode, for the adoption of a son"—(here follows the same, as in the quotation from Vasishtha, from "Man produced &c" down to, "unless with the assent of her husband.") "One about to adopt, produces two pieces of cloth, a pair of ear-rings, a ring and a priest thoroughly read in the Vedas, a bunch of sixty-four stems of the kuca grass, and fuel of the purna tree. Then having invited kinsmen, into the middle of the dwelling, and having made a representation to the king: having sat down by the direction of a Brahmana, in the assembly, or in the middle of his house: having caused to be exclaimed auspicious day! benediction! prosperity! having performed rites, commencing with the recitation of the prayer "Yaddevayajana," down to the placing the vessels for water; having advanced before the giver, let him thus beg 'give me this son.' The other replies 'I give.' He receives the child (and says) 'I receive thee for the sake of religious duty. I adopt thee, for offspring.' Then having adorned him, with cloths and ear-rings and ring: having performed the investiture, and other ceremonials, down to the kindling, a flame of fire; having dressed oblations, he offers a burnt offering. After having recited the incantation in the first chapter of the (Yajur) Veda, commencing ('Yas-tua-hridakirinamanyamana') with recitation of the sacrificial prayer. "Yasmai-tuam-sukritejata-vede, &c." he offers a burnt offering. Next, having performed the burnt sacraments, where the prayers denominated 'vyahriti' are recited: (and) that designated 'Svishta-krit' with other ceremonials, being completed, down to the bestowing an excellent cow, he presents the fee (saying, yours are) these two cloths, the ear-rings, and the ring likewise. But subsequently, if a real ligitimate son is born, he (the adopted son) succeeds to a fourth share; so says Baudhayana."..... 103 *a*

DATTAKA CHANDRIKA VASISHTHA.—Vasishtha "A person being about to adopt a son should take an unremote kinsman, or the near relation of a kinsman; having convened his kinsmen, and announced his intention to the king and having offered a burnt offering with recitation of

Page.

the prayers denominated 'Vyahriti' in the middle of his dwelling. But if a doubt arise let him set apart like a Cudra one whose kindred are remote. For it is declared in the Vedas: 'many are saved by one.' When a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part."..... 103 *a*

DATTAKA CHANDRIKA—VASISHTHA.— "When a son has been adopted, "if a legitimate son be afterwards born, he shares a fourth part pro- "vided (the estate) may not have been expended in acts of merit." 103 *a*

DATTAKA CHANDRIKA.—For the sake of removing the conflicting contradictions of several varying texts of Menu and the rest, the following interpretation are offered on these texts. The declaration in Vrihaspati's text, that the real legitimate son succeeds exclusively to the estate, and that the rest are entitled nearly to subsistence, regard such sons of the wife and the rest who are unequal in class, on account of uniformity with text of Catyayana and Devala. And the rule also in the texts of Nareda and the rest, for the succession of the son given and the rest to the estate, on default of the son of the wife, and the rest, regards their succession to the whole estate, and therefore the rule for the fourth of the share of the real legitimate son propounded by Vasishtha, where such son may be born subsequent to the adoption of a son given must be understood as applying to son given. 103 *a*

MITACSHARA.—24, 25, 26.

24. So the allotment of a quarter share to other inferior sons, when a superior one exists, has been ordained by Vasishtha. "When a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." Here the mention of a son given is intended for an indication of others also, as the son bought, son made by adoption, and (son self-given and) the rest for they are equally adopted as sons..... 103 *a*

MITACSHARA.—25. Accordingly Catyayana says, "If a legitimate son be born, the rest are pronounced sharers of a fourth part, provided they belong to the same tribe; but, if they be of a different class, they are entitled to food and raiment only."..... 103 *a*

MITACSHARA.—26. "Those who belong to the same tribe," as the son of the wife, the son given and the rest (namely the sons bought, made, self-given and discarded,) share a fourth part, if there be a true legitimate son: but those, who belong to a different class, as the damsel's son, the son of concealed origin, the son of a pregnant bride, and the son by a twice-married woman, do not take a fourth part, if there be a legitimate son but they are entitled to food and raiment only..... 103 *a*

SMRITI CHANDRIKA.—In taking the assets of the adoptive father too, there are certain instances in which the boy adopted does not inherit

Page.

the whole estate. Accordingly Vasishtha:—"When a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part."..... 103 *a*

MADHAVYA.—Menu has mentioned an exception to the Aurasa son succeeding to the property, (viz, if) there be a Aurasa and also a Putrika son: "When a son is born after a daughter has been appointed (to bear a son) the partition must be equal, for there is no primogeniture for a woman" Vasishtha also mentions an exception. "After he (a Dattaka) has been received if an Aurasa son be born, the Dattaka takes a fourth part." Catyayana also says; "If an Aurasa son is born, other sons of the same caste are to take fourth parts, but those of different castes get food and garments." "Those of the same caste," Xetraja, Dattaka, &c; they take a fourth part if there be an Aurasa son. "Those not of the same caste"; Kanina, Gudhastpanna, Sohodhaja, and Pannarbhava sons; these, if there be a Aurasa son, do not take a fourth part, but only food and garments; such is the meaning..... 103 *a*

DATTAKA MIMANSA.—Exclusion, from participation in the whole estate, is implied, from the cogency of the term, share; (which intends,) "a share of the estate," and an account of,—a text of Catyayana, which expresses,—"But, if they be of a different class, they are entitled to food and raiment only," and a portion from Yajnyawalkya, commencing, "amongst these, the next in order is heir, and presents funeral oblations &c" and ending "this law is propounded by me, in regard to sons, equal by class."..... 104 *a*

APPENDIX TO MINORITY.

MENU.—'The property of a student and of an infant, whether by descent or otherwise, let the king hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year.'..... 113 *a*

Do. ..... 125 *b*

RETNACARA II DIG. 243-p 365.

The investiture and other ceremonies must only be performed by the husband of his mother; for he is claimed by him as a son. This child derives a family name from the primitive stock of both fathers, for Baud' hayana says he claims both families (CCXXXVII). In the triple set of oblations to be offered by him, there shall be two paternal lines, say these rigid interpreters; for it is similar to the double set.

An apparent contradiction here occurs between the texts of Baud' hayana and others, and those of Menu and the rest. It is thus reconciled by Chandeswara: if the husband's brother or other person

Page.

appointed to raise up a son to the husband, have male issue, then the son of the wife belongs to the husband alone, not to the natural father; but if he procreate the son, stipulating by special compact; that "the child shall in this world equally belong to both of us," that child shall be son of both. Menu himself makes this evident.. 113 *a*

SMRITISARA VIRESWARA AND BHAVADEVI.—2. Str. H. L. 76. zilla of Madura (Ante Vol. I. p. 72.)

Question.—The father being dead, at what age is his son liable for his debts?

Answer.—Not till after seventeen. (signed) Seshadree Iyengar.

Remarks.—The son is of age at sixteen years complete, or at entrance on his seventeenth.

Juganatha, in his Digest, says the sixteenth year, or end of the fifteenth, overlooking several authorities which are express as to this point. (Dig. vol. I. p. 293) Thus Vireswara, the commentator of the Mitacshara, says, "a youth is independent immediately after sixteen years." Bhavadevi, commenting on a passage of Vrihaspati, concerning performance of penance by a boy under sixteen, observes, "a boy above eleven years, to the end of sixteen, must be here understood." Herenatha author of the Smriti-sara, expounds the words "after the minor has passed adolescence," in a passage of Catyana, as signifying above sixteen years. And Raghunandana, the great authority of Bengal, says, "one who has not arrived "at years of discretion, is one whose age is less than sixteen years."..... 113 *a*

MENU.—If he be neither an idiot, nor an infant under the full age of fifteen years, and if the chattel be adversely possessed in a place where he may see it, his property in it is extinct by law, and the adverse possessor shall keep it.....113 *b* & *c*

CATYAYANA.—On the death of a father, his debt shall in no case be paid by his sons incapable from non-age of conducting their own affairs: but at their full age, of fifteen years, they shall pay it in proportion to their shares: otherwise they shall dwell hereafter in a region of horror. 113 *b* & *c*

MISRA.—I. DIG. B. I. CH. V. V. 188.—in page. 202.

But Misra cites the text of Catyayana (Book. III. Chap. IV. V. 15): it is therefore his opinion, that an independent son, or one who has neither father nor mother, and is not under the age of sixteen years, is liable for the payment of debts. It may be here noticed incidentally, that "until his sixteenth year," signifies to the nearest, limit of his sixteenth year: consequently he is a minor until the close of his fifteenth year. The construction of the text is this: 'an adolescent is also called a minor.' But strictly the term (pogenda) is applicable

Page.

only to a child under the age of ten years, agreeably to the text cited by Sridharaswami.....113 *b* & *c*

SMRITI.—While the eldest brother lives the rest are not independent; but seniority is founded both on virtue and on age.

2. All subjects are dependent, the king alone is free: a pupil is declared dependent; freedom belongs to his teacher:

3. All wives, sons, slaves, and unmarried girls are dependent: and a householder is not uncontrolled in regard to what has descended from an ancestor.

4. An infant (sisu), before his eighth year, must be considered as similar to a child in the womb; but a youth or adolescent (pogenda) is called a minor until he has entered his sixteenth year.

5. Afterwards he is considered as acquainted with affairs, or adult in law, and becomes independent on the death of both parents; but, however old, he is not deemed independent while they live... 113 *b* & *c*

Do. ..... 114 *a*

DATTAKA MIMANSA.—"Let not wives and sons, being unwilling, undergo sale, nor even gift." As for the prohibition in this text, of Catyayana, against the gift and so forth, of persons unwilling, that even, must be interpreted as forbidding, the gift of a boy of five years only: not of one older.—And: —"one discriminating, not a minor." As for, what is thus interpreted by Sarvajinya, adverting to this reading,—("discriminating good and evil") in the text,—whom a man takes being alike, &c: that must be explained thus: 'a boy of five years only, discriminating by the faculty of reason: but not a minor (generally'). The meaning is, "he should not take (any) one, coming within, this definition,—'*A minor (bala) is till the sixteenth year.*" 113 *b* & *c*

DAYABHAGA.—Sricrishan. p. 58.

Accordingly (since partition by the choice of one co-heir is lawful) Catyayana, treating of partition, says: "Let them deposit, free from "disbursement, in the hands of kinsmen and friends, the wealth of "such as have not attained majority; as well as of those who are "absent." So a text expresses. The property of minors should be "so preserved until they attain their full age."

17. Such as have not attained majority, whose age does not exceed fifteen years. Sricrishna.....113 *b* & *c*

NAREDA.—What has been given by men agitated with fear, anger, lust, grief, or the pain of an incurable disease; or as a bribe, or in jest, or by mistake, or through any fraudulent practice, must be considered as ungiven.

Page.

2. So must any thing given by *a minor*, an idiot, a slave or other person not his own master, a diseased man, one insane or intoxicated, or in consideration of work unperformed..... 114 *b*

Do. ..... 115 *a*

MITACSHARA ON JUDICATURE.—I Mac Naughten p. 225.

7. Moreover, "A suit adduced by one intoxicated, or deranged, or diseased, or distressed, or *a minor*, or terrified, or uninterested &c, is not valid." "Intoxicated" with spirituous liquors, "Deranged:" disordered in any of the five modes by a prevalence of wind, or of bile, or of phlegm, or under a morbid state of the three humours, or under planetary influence. "Diseased." by sickness, "Distressed": distress engendered by the privation of ease and the acquisition of pain. "A minor": one incompetent, through nonage, to the transaction of his affairs. "Terrified" by enemies. "Uninterested": from having no connexion with the matter at issue. The use of the term "&c" signifies a suit adduced in opposition to usages, of the town or the realm and the like. It has been established by those versed in judicial proceedings, that the suit of one will not be attended to, when it is in opposition to the usages of the town or realm, as appears from the text: That act which is in opposition to the usages of a town or realm, and that act which has been prohibited by the ruling power, have no validity; and this rule must also be understood relatively to the act of him who has no delegated or natural interest in the suit. 114 *b*

YAJNYAWALKYA.—A contract made by a person intoxicated, or insane, or grievously disordered, or disabled, *by an infant*, or a man agitated by fear or the like, or, in the name of another, by a person without authority, is utterly null..... 114 *b*

Do. .....114 *c d e f*
Do. ..... 121 *a*
Do. ..... 122 *a*
Do. ..... 124 *b*

MENU.—163. A contract made by a person intoxicated, or insane, or grievously disordered, or wholly dependent, *by an infant* or a decrepit old man, or in the name of another by a person without authority, is utterly null..... 114 *b*

Do. .....114 *c d e f*
Do. ..... 124 *b*

MENU.—Let every man constantly do what may please his parents: and, on all occasions, what may please his preceptor, when those three are satisfied, his whole course of devotion is accomplished..... 118 *a*

MENU.—Let the father alone support his sons; and the first born, his

Page.

younger brothers ; and let them behave to the eldest, according to law, as children should behave to their father..... 118 *a*

Do. ..... 118 *d*

DEVALA.—As the suspended water-pot matures the pippala tree, so a father, a grand-father, and a great grand-father, cherish a son from the moment of his birth.

2. With honey, flesh-meat, pot-herbs, milk and milky food ; reflecting, "he will give us the annal Sraddha, and that which is offered "under the lunar asterisum Magha."..... 118 *a*

Vide Yajnyawalkya in 48 *g*.

JAGANNAD.—II. Dig p 576.

If one who has an infant son die, his property must be preserved by the kinsmen or brother of the minor ; it must not be immediately distributed : but they may divide the estate after he has passed adolescence. Such is the meaning of the phrase. Consequently, the share of a minor must be preserved during his adolescence by kinsmen, like the allotment for an absent parcener ; for the reason of the law is the same : but before his adolescence partition is not proper. In like mannner, the king, or the kinsmen appointed by him, should guard the minor's property received from his brothers as his share of the inheritance. Here kinsmen signify relations in the male line, or, on failure of them, a sister's or daughter's son, or other near kinsman of the father. *In practice, a mother is guardian of a minor, and of his property* : and that is proper, if she be capable of protecting the ward ; but being a woman, she is under the control of her husband's mother and the rest : still the effects of the widow and of the grand-son must be guarded ; and since the mother-in-law is a woman, she requires the aid of another kinsman, and he should be selected with the concurrence of the paternal grand-mother, and be approved by the king ; for the paternal grand-mother best knows who among the kinsmen is skilled in the conduct of affairs, and the king is an universal superintendent : and if the widow be old and capable of governing her own conduct, there is no harm in permitting the estate to be guarded by a kinsman selected by her ; for it is only directed that a widow and the rest shall guard the property by any possible means. A contest arising betwen the mother-in-law and the widow, if the king, residing at a great distance, cannot accurately distinguish their good and bad characters, then indeed any person may be appointed by the king's own selection. This method, established by lawyers on their own judgment is consistent with the reason of the law..... 118 *b*

Page.

I. MAC NAUGHTEN's, H. L.—Mitacshara on evidence p, 270.

3. Or else witnesses of the description before mentioned may be employed, as appears from the following text of the Smriti: "For the purpose of proving any act done by the party transacting it, witnesses may be relied upon in judicial proceedings. The act of a party may be good without a writing."..... 118 *c*

MENU.—The eldest brother may take entire possession of the patrimony; and the others may live under him, as they lived under their father.

MENU.—Ch. IX.

105. 'The eldest brother may take entire possession of the patrimony; and the others may live under him; as they lived under their father, unless they choose to be separated.

108. 'Let the father alone support his sons; and the first born, his younger brothers; and let them behave to the eldest, according to law, as children should behave to their father..... 118 *d*

CATYAYANA.—Catyayana:—Let all the co-heirs guard the share which belongs to an absent parcener;

2. But if a man die, leaving an infant son, his wealth must be preserved entire by his kinsmen; and they may divide it in due proportions, after the minor has passed adolescence.

If one who has an infant son die, his property must be preserved by the kinsmen or brethren of the minor; it must not be immediately distributed: but they may divide the estate after he has passed adolescence. Such is the meaning of the phrase. Consequently, the share of a minor must be preserved during his adolescence by kinsmen, like the allotment of an absent parcener; for the reason of the law is the same: but before his adolescence partition is not proper. In like manner, the king, or the kinsmen appointed by him, should guard the minor's property received from his brothers as his share of the inheritance. Here kinsmen signify relations in the male line, or on failure of them, a sister's or daughter's son, or other near kinsmen of the father. In practice, a mother is guardian of a minor, and of his property: and that is proper, if she be capable of protecting the ward; but being a woman, she is under the control of her husband's mother and the rest: still the effects of the widow and of the grand-son must be guarded; and since the mother-in-law is a woman, she requires the aid of another kinsman; and he should be selected with the concurrence of the paternal grand-mother, and be approved by the king; for the paternal grand-mother best knows who among the kinsmen is skilled in the conduct of affairs, and the king is an universal superintendent: and if the widow be old and

Page.

capable of governing his own conduct, there is no harm in permitting the estate to be guarded by a kinsman selected by her; for it is only directed that a widow and the rest shall guard the property by any possible means. A contest arising between the mother-in-law and the widow, if the king, residing at a great distance, cannot accurately distinguish their good and bad characters, then indeed any person may be appointed by the king's own selection. This method, established by lawyers on their own judgment, is consistent with the reason of the law..... 118 *d*

KULAKA BUTTA ON MENU.—No act in regard to the property or liability of a minor is valid but such as may be clearly one of necessity, or for the benefit of the minor. (Koollooka Bhut on Menu VIII 27.).....119 *a b & c*

MITACSHARA.—An exception to it follows: "Even a single individual may conclude a donation, mortgage, or sale, of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes."..... 119 *b & c*

VYAVAHARA MAYUKA.—Menu. "When the Judge discovers a fraudulent pledge, or sale; a fraudulent gift, and acceptance, or in whatever other case he detects fraud, let him annul the whole transaction." Fraud, circumvention, or in whatever other case, that is in whosoever's business. The meaning is, the whole of that business in which fraud is detected shall be reversed. Katyayana: "What a man has promised, in health, or in sickness, for a religious purpose, must be given; and if he die without giving it, his son shall doubtless be compelled to deliver it." For a continuation of this subject, the Dvaita Nirnaya, written by Guru, must be referred to..... 120 *a*

KULOOKA BHUT ON MENU.—Ch. VIII. 27..... 120 *b*
entered in 119. *a*.

MITACSHARA.—Ch. I. S. I. 28 entered in 119 *b* & *c*.....120 *b c & d*

VYAVAHARA MAYUKA.—Ch. IX. 10. entered in 120 *a*..... 121 *a*

YAJNYAWALKYA—Dig. B. III. Ch. IV. S II. V. 58 entered in 114*c. d. e. f.* 121 *a*

KOOLOOKA BHUT ON MENU.—Ch. VIII 27. entered in 119 *a*.

YAJNYAWALKYA—I. Dig. B. II. Ch. IV. S. II. V. 58 entered in 114 *c. d. e. f.* 122 *a & b*

MENU—Ch. VIII 163 entered in 114 *b*.....122 *a & b*

MENU.—'When the Judge discovers a fraudulent pledge or sale, a fraudulent gift and acceptance, or in whatever other case he detects fraud let him annul the whole transaction..... 123 *b*

MENU.—Ch. VIII. 165 entered in 123 *b*..... 124 *a*

MENU.—Ch. VIII. 163 entered in 114..... 124 *b*

YAJNYAWALKYA.—I. Dig. B. II. Ch. IV. S. II. V. 58 entered in 114 *c d e f.* 124 *b*

Page.
MITAKSHARA.—Ch. I. S I 28 entered in 119 *b. & c*..... 125 *a*

MENU.—Ch. VIII. 27 entered in 113 *a*..... 125 *b*

VISHNU.—The king should guard the property of an infant, and the effects of the husband and wife in the absence of the husband.

SANCHA AND LICHITA.—Sancha and Lichita:—Let the king protect the effects of infants who are incapable from non-age of conducting their own affairs, and the goods belonging to widows of learned priests and of valiant soldiers; but effects of which there are no owners escheat to the king..... 125 *b*

BAUDHAYANA.—Baudhayana, treating of the succession of sons:—Their shares, if they be incapable from non-age of conducting their own affairs, let the king keep carefully guarded, together with the accumulation on those shares, until the minors arrive at years of discretion..... 125 *b*

KULLOOKA BHUT ON MENU—Ch. VIII 27 entered in 119 *a*..... 125 *b*
SANCHA ANDLICHITA. SMRITI CHANDRIKA.—Ch. I. 28. entered in 193 *a*..... 128 *a*
Vide 125 *a* and *b*..... 128 *a*

APPENDIX TO CO-PARCENERY.

GAUTAMA 1. W. and B. 321. Sutra 3.

Or, let the eldest take all (the property after the father's death) and let him support the other (brothers) as the father did formerly..... 173 *a*

NAREDA SUTRA.—Or let the eldest brother, by consent, support the rest, like a father, or let a younger brother, who is capable, do so; the prosperity of the family depends on ability..... 173 *a*

SMRITI CHANDRIKA—Ch. XVI..... 174 *b*

18. If it be asked, how, if so, a division is to be ascertained where it is incapable of being established by any of the circumstances aforementioned, Menu enjoins: "When there is a doubt of partition among the co-heirs, a partition must be again made even though they have taken separate places of abode."

19. This is where the fact of partition is so much involved in doubt as to be incapable of being ascertained under any circumstances. 173 *a*

VYAVAHARA MAYUKHA MENU.—In case also of total failure in ascertaining whether they were separated or united, a fresh partition is enjoined by Menu: "When there is a doubt of partition among the co-heirs, a partition must be again made, even though they have taken separate places of abode." Nareda states the duties of separated co-heirs; "When there are many persons, sprung from one man, who have their (religious) duties (dhurma) apart, and transactions (kriya) apart, and are separate in the materials of work

Page.

(karma gunali), if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please : for they are masters of their own wealth." Duties ; ceremonials, that is, the five great sacrifices, (para. 31) and the like. Transactions, commerce, and the like worldly acts. The materials of work, household necessaries, and the like as the means of performing the acts of the householder. By the separate existence of these, a partition is manifested. The sense is, that they, so separated, may each even without the consent of the others make the gift, sale, on other alienations of their respective shares..... 173 *a*

MADHAVIA.—Menu says in regard to this : "If there is doubt in regard to partition of co-heirs among themselves, partition must again be made even by those who have separate abodes." The meaning is, that, partition is to be carried out again if the doubt cannot be settled by inference. But as for what he also says ; "Partition is made once, a maiden is given once, "I give" is said once, these three are done only once," this is to be understood of the case in which it is possible by inference, &c., to ascertain the truth.

Brihaspati says that one who disturbs a doubtful partition that he has agreed to, should be punished by the king : "He who being separated by his own will breaks his own promise, is to be confined to his own portion by the king and also punished for his crime." Crime, *i. e.* obstinacy..... 173 *a*

MENU 105.—The eldest brother may take entire possession of the patrimony, and the others may live under him, as they lived under their father, unless they choose to be separated.

MENU 108.—Let the father alone support his sons, and the first born, his younger brothers ; and let them behave to the eldest, according, to law, as children should behave to their father..... 173 *a*

MENU 111.—Either let them thus live together, or, if they desire separately to perform religious rites, let them live apart ; since religious duties are multiplied in separate houses, their separation is, therefore, legal and even laudable..... 173 *a*

SMRITI CHANDRIKA.—Reply. This is true, but the text "Either let them thus live together" was introduced in order to commend the common abode of brothers of discretion. Whereas, the text. "The eldest brother alone shall take the patrimony entire, and so forth," is intended to show that where younger brothers have not attained majority, common abode in the manner therein indicated is imperative until they attain their full age. This text therefore does not altogether negative partition of heritage among brothers of the same class. There is thus no contradiction..... 173 *a*

MTL. ON ONUS PROBANDI.—I. Macn, Hindu Law. Page 165.

Page.

1. The establishment of the claim being dependent on evidence, it is propounded by whom that evidence is to be adduced. "The claimant shall immediately reduce to writing the evidence of the thing to be proved." After the answer, the claimant, that is to say, he who has the matter to prove, shall reduce to writing immediately, without any interval, the evidence, or that by which the matter is to be proved. From the injunction of its being immediately reduced to writing, it may be inferred, that in furnishing an answer, delay is occasionally allowed: this point will be subsequently considered. The meaning appears to be, that, as the necessity of proceeding without delay was not prescribed in the case of giving in the answer, as it has been in the case of recording the evidence, time is occasionally allowed in preparing the answer to the claim on the principle of "expressio unius est exclusio alterius..... 173 *a*

Do. ..... 174 *a*

Do. ..... 188 *b*

2. From the direction that the claimant shall reduce to writing &c., it follows, that he is to write down the evidence of the matter adduced who has any thing to prove: hence, when former judgment is pleaded, as this is the matter to be proved, he who adduces that plea is the claimant. He (the defendant) therefore is considered as the claimant, and he must adduce the evidence. *In a special exception also as this is the thing to be proved, he who adduces that plea is is the claimant, and he is the person to adduce the evidence*..... 174 *a*

Do. ..... 177 *a*

Vyavahara Mayuka. Nareda—Onus Probandi.—The same author states the reason for this notice of a void answer: "For in one suit, the proof cannot rest on both parties, nor can both obtain judgment, nor can two answers be offered at once." Here the meaning is this: 'In giving a flat denial and a special exception in one answer, the actions of two different plaintiffs are opposed to each other.' It has been thus declared by Nareda: "It has been recorded, that in the case of a total contradiction, the proof rests with the complainant; and *in the case of a special exception, with his adversary.*" Therefore both parties in one cause (exhibiting; proof) is contrary (to law.) Even so, both actions lie on the defendant, when there is a jumbling of a special plea, with plea of former judgment; for it is said by Vyasa: "In pleading a former judgment and special exception, the defendant must exhibit the proof." And again by the same: "In plea of former decision, it must be satisfactorily established, by exhibiting (copy of) the decree so gained to the Chief Judge, and the rest likewise." Therefore, in pleading a former decision, it must be established, either by exhibition of the decree, or by those who saw the original decree, or the like. But in an answer setting up a special exception, the defence (must be sup-

Page.

ported) also by witnesses, documents, and other proof. Here also, (proof on both sides in one cause) is contrary (to law.) The same rules must be observed also in a mixture of three or four (pleas in one answer.)..... 173 *a*

Do. ..... 174 *a*

DAYABHAGA.—15. If then they desire to remain unseparated, the eldest brother, being capable of the care and management of the estate, may take the whole; and the rest should live under him, as under a father. Thus Menu says, "The eldest brother may take the patrimony entire; and the rest may live under him as under their father." So Gautama, "Or the whole may go to the first-born; and he may support the rest as a father." From the particle "or" it appears, that they may either become separate or continue to dwell together; and their dwelling together must be by consent of all. Thus Nareda says, "Let the eldest brother, by consent, support the rest like a father; or let a younger brother, who is capable, do so. The continuance of the family depends on ability. Even the youngest, being capable, may govern all the brethern. The middlemost of course may, being here inferred by the analogy of the loaf and staff.

16. But partition takes place by the will of any one (of the co-heirs) as before intimated..... 173 *a*

SANCHA AND LICHITA.—Willingly let them live together; *by union they exhibit thrift*..... 173 *a*

MENU.—Wealth, however, acquired by learning, belongs exclusively to any one of them, who acquired it: So does any thing given by a friend, received on account of marriage, or presented as a mark of respect to a guest..... 174 *c*

Do. ..... 182 *a*
Do. ..... 178 *b*

MENU.—What a brother has acquired by labour or skill, without using the patrimony, he shall not give up without his assent; for it was gained by his own exertion..... 174 *c*

Do. ..... 177 *a*
Do. ..... 182 *a*
Do. ..... 183 *a*
Do. ..... 188 *a & b*

MITACSHARA. YAJNYAWALKYA.—The author explains what may not be divided, "Whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he,

Page.

who recovers hereditary property, which had been taken away, give it up to the parceners : nor what has been gained by science..... 174 *c*

Do. ..... 176 *a*

Do. ..... 178 *c*

MITACSHARA. CANKHA.—If it be land, he takes the fourth part, and the remainder is equally shared among all the brethren. So Cankha ordains. " Land (inherited) in regular succession, but which had been formerly lost and which a single (heir) shall recover solely by his own labour, the rest may divide according to their due allotments, having first given him a fourth part (b)."..... 174 *c*

DAYABHAGA.—19. This, however, relates only to the gains of science. So Katyayana declares : " No part of the wealth, which is gained by science, need be given by a learned man, to his unlearned co-heirs : but such property must be yielded by him, to those who are equal or superior in learning."..... 174 *c*

DAYABHAGA.—22. This is precisely the object of the reasoning taught (in the Mimansa) under the head of Holaka..... 174 *c*

DAYABHAGA.—23. Or the same meaning may be deduced from reasoning (without the trouble of inferring the origin of the rule from a last passage of scripture.) That, which is acquired by a person, belongs exclusively to him, so long as he lives ; if there be no special rule (to the contrary) : but where the exertion of one is merely through the joint-property, and the other contributes to the acquisition by his person and wealth, it is a rule suggested by reason, that the one shall have a single share, and the other two. Hence likewise it follows, that, if the joint stock be used, shares should be assigned to each person in proportion to the amount of his allotment, be it little or much, which has been used..... 174 *c*

MITACSHARA CATYAYANA.—But, it is alleged, the enumeration of amicable gifts and similar acquisition is pertinent, as showing, that such gains are exempt from partition, though obtained at the expense of the patrimony. Were it so, this would be inconsistent with the received practice of unerring persons, and would contradict a passage of Nareda. " He, who maintains the family of a brother studying science, shall take, be he ever so ignorant, a share of the wealth gained by science." Moreover the definition of wealth, not participable, which is gained by learning, is so propounded by Katyayana. Wealth, gained through science which was acquired from a stranger while receiving a foreign maintenance, is termed acquisition through learning..... 174 *c*

NAREDA SUTRA 5 W. AND B. 361.

Or let the eldest brother, by consent, support the rest, like a

Page.

father, or let a younger brother, who is capable, do so: the prosperity of the family depends on ability..... 174 *b*

GAUTAMA SUTRA.—27 W. and B. 324.

What a learned (co-parcener) has acquired by his own efforts, he may, at his pleasure, withhold from his unlearned (co-parceners)..... 174 *c*

NAREDA SUTRA.—6-7-10 and 11 W. and B. 351.

1. Both what is gained by valour, and the wealth of a wife, and what is acquired by science, these are three sorts of property exempt from partition, and any favour conferred by the father.

7. And, if the mother has given through affection (a portion of) her (separate) property to one (of her sons), to that also this (the above) rule refers; for the mother is like the father (able to bestow gifts).

10. He who maintains the family of a brother studying science, shall take, be he ever so ignorant, a share of the wealth gained by science.

11. A learned man needs not give a share of his own acquired wealth without his assent, to a learned co-heir: provided it were not gained by him, using the paternal estate..... 174 *c*

MITACSHARA VRIHASPATI.—Or you may be satisfied with considering it as an exception to what is suggested by another passage. "All the brethren shall be equal sharers of that which is acquired by them in concert:" and it is therefore a mere error to deduce the suggestion from an indefinite import of the word "eldest," in the text before cited.

13. That passage must be interpreted as friendly gifts and the rest, that they are exempt from partition, both before the father's death and after his demise..... 174 *c*

MITACSHARA.—Here the phrase "any thing acquired by himself, without detriment to the father's estate," must be every where understood: and it is thus connected with each member of the sentence; what is obtained from a friend, without detriment to the paternal estate; what is received in marriage, without waste of the patrimony; what is redeemed, of the hereditary estate, without expenditure of ancestral property; what is gained by science, without use of the father's goods. Consequently, what is obtained from a friend, as the return of an obligation conferred at the charge of the patrimony; what is received at a marriage concluded in the form termed Asura or the like; what is recovered, of the hereditary estate by the expenditure of the father's goods; what is earned by science acquired at the expense of ancestral wealth; all that must be shared with the whole of the brethren and with the father..... 174 *c*

DAYABHAGA.—Menu and Vishnu declare indivisible what is gained without expenditure. "What a brother has acquired by his labour, without

Page.

using the patrimony, he need not give up without his assent; for it was gained by his own exertion."..... 174 *c*

Do. ..... 178 *b*

DAYABHAGA VYASA.—So Vyasa ordains, "What a man gains by his own ability, without relying on the patrimony, he shall not give up to the co-heirs; nor that which is acquired by learning."..... 174 *c*

Do. ..... 178 *b*

DAYABAGA 6 and 11.

Next the proof is by written evidence: but written proof is (in general) superior to oral testimony: being so declared (by an express passage of law.) Testimony is better than presumption; and writing is better than oral evidence."

11. By saying "if there be neither writing nor witnesses."(8) it is intimated that presumptive proof is to be admitted only in default of written and oral evidence..... 175 *a*

MIMANSA MIT. ON JUDICATURE—I. Macn. 196. N. I.

To the due understanding of this, it is necessary to explain, that according to the Mimansa philosophy, there are three modes of proof: Pratyaksha, or the evidence of the senses; Unnoomana, or the evidence from inference; and Shubda, or the evidence from sound... 175 *a*

Do. ..... 179 *a*

MIT ON JUDICATURE—I. Macn. 165 P. 3.

But in a case of total denial, the Plaintiff is the claimant, and it rests therefore with him to adduce the evidence: hence, by the use of the expression "the claimant shall reduce to writing," it is meant, that he who has any thing to prove, is to do so, and not any other person.176 *a* & *b*

Do. 182-*b*

Do. 183-*a*

Y. V. Vide..... 174 *c*

NAREDA SUTRA.—36. W. and B. 356.

If a question arise. Among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution or by the separate transaction of affairs.. 179 *c*

Do. ..... 183 *b*

VYAVAHARA MATUKA.—Or else, if there be unity of place, time, agent, and the rest, the instrumentality of one only, is found by reasoning. But where the agents are different, and the same results by the text itself; for, in a difference of place, there is a want of concurrence both of the text and reasoning too; and therefore, the separate

Page.

performance of Cráddhas and other rights, by any one of them whomsoever, is founded in reason : which is my conclusion..... 179 *e*

Do. ..... 183 *b*

Do. .....178 *a* & 184 *f*

DAYABHAGA.—In the next place, the proof is by the circumstance of separate transaction of affairs(1) as it is stated by Nareda, " Gift and acceptance of gift, cattle, grain, house, land and attendants, must be considered as distinct among separated brethren, as also diet, religious duties, income and expenditure separated, not unseparated, brethern may reciprocally bear testimony, become sureties, bestow gifts and accept presents. Those, by whom such matters are publicly transacted with their co-heirs, may be known to separate even without written evidence.

DAYABHAGA.—It is not to be concluded from the use of the plural number, in the phrase, " by whom such matters are transacted " (7), that the concurrence of all those circumstances is required. For these texts are founded on reason; and the reason is equally applicable in every several instance..... 179 *e*

Do. ..... 183 *b*

Do. .....184 *a* to *f*

NAREDA—II. Dig. B V 387.

1. Nareda: of undivided brethren the religious duty is single, but after partition such duties are separately fulfilled.

2. When co-heirs have made a distribution, the acts of giving and receiving cattle, grain, houses, land, household establishments, dressing victuals, religious duties, income and expenses, are to be considered as separate and (conversely) as proofs of partition.

3. After separation, but not before it, brothers may become witnesses or sureties for each other, and may reciprocally give and receive presents, or make contracts with each other: but, in regard to property separately acquired, they may do so even before partition.

4. Those by whom such acts are publicly done with their own separate property, let men consider as divided even without written evidence..... 179 *e*

Do. ..... 185 *a*

SMRITI CHANDRIKA.—16 & 19.

As for disputes arising within ten years after partition, they are to be determined not, with reference to the rules contained in the above text (para 14) of Katyayana; but with reference to the circumstances already noticed. Where however, these circumstances, from being satisfactorily explained away, fail to prove the fact of division,

Page.

there is a text which permits recourse being had to a divine test. The text is: "In the absence of all these a divine test is prescribed.

19. This is where the fact of partition is so much involved in doubt as to be incapable of being ascertained under any circumstances. 179 *e*

Do. ..... 180 *a*

Do. ..... 178 *a* & 184 *f*

Do. ..... 188 *b*

VYAVAHARA MAYUKA MENU.—In case also of total failure in ascertaining whether they were separated or united, a fresh partition is enjoined by Menu :(6) "When there is a doubt of partition among the co-heirs, a partition must be again made, even though they have taken separate places of abode."..... 180 *a*

SMRITI CHANDRIKA.—If it be asked, how, if so, a division is to be ascertained where it is incapable of being established by any of the circumstances aforementioned, Menu enjoins; "When there is a doubt of partition among the co-heirs, a partition must be again made even though they have taken separate places of abode."..... 180 *a*

Do. ..... 184 *f*

MADHAVYA. 57.—Menu says in regard to this: "If there is doubt in regard to partition of co-heirs among themselves, partition must again be made even by those who have separate abodes." The meaning is that, partition is to be carried out again if the doubt cannot be settled by inference. But as for what he also says: "Partition is made once, a maiden is given once, 'I give' is said once, these three are done only once," that is to be understood of the case in which it is possible by inference &c., to ascertain the truth.

Brihaspati says that one who disturbs a doubtful partition that he has agreed to should be punished by the king: "He who being separated by his own will breaks his promise, is to be confined to his own portion by the king and also punished for his "crime" (*i. e.*) obstinacy..... 180 *a*

MENU.—105. The eldest brother may take entire possession of the patrimony; and the others may live under him, as they lived under their father, unless they choose to be separated..... 177 *a*

Do. ..... 183 *a*

Do. ..... 184 *g*

Do. ..... 188 *b*

Do. ..... 177 *a b* & *c*

Vide ..... 174 *a* & *c*

Page.

VYAVAHARA MAYUKA CAKALA.—Here again, as, in the unity of place, time, agent, and the like, one agent is by reasoning obtained for several causes, as supporting several parts of one act; so even, we may understand from the text, that there may be distinct acts, of agents (otherwise) unseparated. Hence all those religious acts required for performance of sacred, as well as of more common rites, even of unseparated brethren, are separate for each, in manner of the distinctions in the nature of a consecrated and a common fire, and the like, though mutually connected. Even so the cráddha also, of the paternal uncle, brother, son, or other (dying without a son) at the Amavasya, and other (season), is even separate, by reason of the separation of the deified (person from the parvana rite.) But the cráddha &c., of brothers (dying) without (maintenance of) a sacred fire, is to be executed by one instrument (or agent) only, because all the deified persons are conjoined. In case of separation of place, by residence abroad, the cráddhas are even separate. The (extra) acts with the fire, requisite for the rites of those who maintained a sacred fire, also, are even separate; but the worship of the household deities, the Vaisnadena and other rites, are to be done by one agent only. Even so cákala says ;(6) "Residing with one dressing of food, worship of a single household deity, and moreover one single sacrifice at meal to the Vievadevas, or manes, shew unity. In a family of divided brethren these acts are performed in each house separately..... 182 *a*

SMRITI CHANDRIKA BRIHASPATI.—Brihaspati, too, says on the subject:—"Among co-heirs living in commensality, *i. e.* with one dressing food, the worship of the manes, deities and Brahmins takes place in one house only-but in a family of divided brethren the above acts are performed in each house separately."..... 182 *a*

Do. .....178 *a* & 184 *f*

VRIHASPATI.— II. D. B. C. VI. S. II. V. 389.

1. Vrihaspati.—A violent crime, immoveable property, a bailment, and a former partition, must be ascertained by just inference, if neither written nor oral evidence exist.

2. A forcible attempt, a mark, and an instrument of offence, are presumptive proofs of violent crime; possession of immoveable property is proof of a title; and separate wealth, of partition.

3. They whose income, expenses, and wealth are separate, who reciprocally lend money at interest, and who make commercial bargain with each other, are doubtless disunited..... 183 *b*

Do. .....184 *a* & 185 *a*

YAJNYAWALKYA Do.—A partition being denied, let the truth of it be ascertained by the evidence first of near kinsmen, then of relations more distant; then of witnesses who are unconnected with the

Pages.

parties, then by written proof, or by separate acts of ownership in house or field..... 183 *b*

NAREDA SUTRA.—W. and B.

If there are many descended from one who perform their religious duties, and carry on their transactions separately, and possess separate instruments for their work, and do not make agreements about their affairs..... 183 *b*

DAYABHAGA 7.—to 10.

So Vrihaspati: "A violent crime, immoveable property, a deposit, and a previous partition among co-heirs may be ascertianed by presumptive proof, if there be neither writing nor witnesses. The exertion of force, a blow, or the plunder, may be evidence of a violent crime; possession of the land may be proof of property; and separate wealth is an argument of partition. They, who have their income, expenditure and wealth distinct, and have mutual transactions of money-lending and traffic, are undoubtedly separate..... 183 *b*

Do. ..... 184 *a*

9. One brother gives and another accepts, or they have separate house and land, or their income and expenditure (of wealth) and abode are separate; or, when a loan or other affair is transacted by one, another is made witness to it, or becomes surety; or they have mutual transaction of money lending or the like; or one, having bought certain goods from another person, sells it for traffic to his brother; in these and similar instances, since any such act can only take place among divided brethren, a presumption of partition is deduced from it by the intelligent..... 185 *a*

MITAÇSHARA.—3. &. 4.

3. The practice of agriculture or other business pursued apart from the rest, and the observance of the five great sacraments, and other religious duties performed separately from them, are pronounced by Nareda to be tokens of a partition. "If a question arise among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by separate transaction of affairs. The religious duty of unseparated brethren is single. When partitions indeed has been made, religious duties become separate for each of them.

4. Other signs of previous separation are specified by the same author: "Separated not unseparated brethren may reciprocally bear testimony, become sureties bestow gifts, and accept presents..... 183 *b*

Do. ..... 184 *a*

SMRITI CHANDRIKA.—3 and 4.

3. Where a question arises as to the truth of the partition itself as by saying "no partition took place among us" or as to the

Page.

truth of a collateral circumstance connected with the partition, as by saying: "The partition was made but not of the whole property," the fact is to be determined by the evidence of kinsmen, *i. e.* co-heirs, and the like, and by the written deed of partition, or by inferences to be drawn from separate transaction of affairs &c.

4. "Separate transaction of affairs" means the performance of the sacrifice called: "Vyevadana"(1) the giving alms and the feeding of guests (Athithees), all separately.

NAREDA.—II. D. B. V. 388.

Among co-heirs living together and partaking of the same food, due honor shown to a deceased father, to deities, and to priests shall be single; but; after partition, that shall be done in their several houses.....184 *a b c d & e*

SMRITI CHANDRIKA MENU.—20. Menu, however, states at the same time: "Once is the partition of inheritance made. Once is a girl given in a marriage. Once is a promise of gift made. These three take place only once." But this text refers to a partition which is capable of being ascertained by circumstances, &c. Hence there is no inconsistency..... 184 *f*

MIMANSA MIT. ON JUDICATURE.—I. MACN H. L. 196. N. L.

Arthapati. This is a mode of reasoning peculiar to the Mimansa School of philosophy of the Hindus, observes: "Presumption, Arthapati, is deduction of a matter from that which could not else be. It is the assumption of a thing not itself perceived, but necessarily implied by another which is seen, heard, or proved." Trans. R. A. S. p. 445..... 184 *f*

YAJNYAWALKYA.—Any other property which a man has himself acquired without using the patrimony, and any thing given by a friend, or received on account of marriage, shall not be shared with co-heirs.

2. He who by his own pains, and at his own charge, recovers or repairs what has descended from his ancestors, and has been long taken away, or nearly destroyed, shall not bring it into partition with co-heirs, unless it be land, nor what he has thus gained by his learning..... 178 *a*

Do. ..... 178 *c*

VYASA.—What is given by a paternal grand-father, or by a father, as a token of affection, belongs to him who receives it; neither that, nor what is given by a mother, shall be claimed by co-heirs.

2. What a man gains by his own strength, without reliance on the patrimony, he shall not give up to the co-heirs, nor what he has acquired by learning..... 178 *a*

Page.

VYAVAHARA MAYUKA.—1 2 & 33.

Menu says, "Wealth, however, acquired by learning, belongs exclusively to any one of them who acquired it; so does any thing given by a friend, received (at or) on account of marriage, or presented as a mark of respect to a guest." Vyasa "Wealth gained by science, or earned by valour or received from affectionate kindred, belongs, at the time of partition, to him (who acquired it), and shall not be claimed by the co-heirs" received from affectionate kindred; (Sandayakam; this term) will be here-after explained.(5)

2. This (wealth) must be understood to be acquired without loss to the father's estate. Thus also Yajnawalkya: "Whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs; nor shall he who recovers hereditary property, which had been taken away, give it up to the parceners: nor what has been gained by science." ..... 178 *i*

SMRITI CHANDRIKA.—Vide ..... 182 *a*

MENU ..... 174 *c*

MENU.—206 & 208. Vide ..... 174 *c*

DAYABHAGA.—1 to 8 ..... 178 *b*

1. In the next place, effects which may be divided, and such as are exempted from partition, are here explained. On that subject Katyayana says, "What belonged to the paternal grand-father, or to the father, and any thing else (appertaining to the co-heirs, having been) acquired by themselves; must all be divided at a partition among heirs."

2. And any thing else. Here the particle 'and' is connected, in the sentence, with the term 'themselves;' viz., acquired by themselves'; or, as implied by the conjunctive particle, acquired by another person: but his acquisition must have been made through the common property (or else by joint personal labour) such is the meaning.

3. Vide page 174.

4. Since the patrimony is not used, there is no exertion on the side of the others, through the means of the common property; and, since it was obtained by the man's labour, there is no corporeal effort on the part of the rest: it is, therefore, the separate property of the acquirer alone; for the phrase "it was gained by his own exertion," is stated as a reason.

5. Vide page 174.

6. Since it is expressed in general terms, 'what he gains solely by his own ability,' all property, so acquired, being his own, is not common. But, as the gains of science, though obtained by the man's

Page.

own ability, are shared by parceners equally or more proficient in knowledge, the phrase " nor that which is acquired by learning," is subjoined for the sake of excluding illiterate or less learned parceners.

7. So Yajnyawalkya directs : Whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs..... 178 *b*

8. Here, the mention of "a present from a friend" and so forth is intended for illustration only ; since it is in such modes that acquisitions are usually made without expenditure..... 178 *c*

MITACSHARA.—That which had been acquired by the co-parcener himself without any detriment to the goods of his father or mother ; or which has been received by him from a friend, or obtained by marriage, shall not appertain to the co-heirs of brethren. Any property, which had descended in succession from ancestors, and had been seized by others, and remained unrecovered by the father and the rest through inability or for any other cause, he, among the sons, who recovers it with the acquiescence of the rest, shall not give up to the brethren or other co-heirs ; the person recovering it shall take such property..... 178 *b*

Do. ..... 178 *c*

Do. ..... 178 *c*

YAJNYAWALKYA.—Vide 178 *a*

MENU.—After the death of the father and the mother, the brothers being assembled, may divide among themselves the paternal and maternal estate ; but they have no power over it, while their parents live, unless the father choose to distribute it..... 178 *d*

NAREDA SUTRA.—32. P. 356.

What remains of the paternal inheritance over and above the father's obligations, and after payment of his debts, may be divided by the brethren ; so that their father continue not a debtor..... 178 *d*

VASISHTA SUTRA.—29. p. 334.

Let the Sapindas or the subsidiary sons (enumerated Sutra 16-21) divide the heritage of him, who has no heir of the first mentioned six kinds..... 178 *d*

CATYAYANA.—H. D. B. V. C. V. 365.

1. Property recorded in a written document, and that which has been appropriated to religious uses, water, wives, and a carrody which has descended from ancestors.

Page.

2. Clothes of great value kept in the treasury, ornaments, and whatever is naturally indivisible, shall be used alternately by the kinsmen during periods assigned to each.

3. Pasture ground for kine, a common way, apparel, and whatever else is worn on the body, necessary implements of learning, as books and the like used severally, or of arts, as pencils or tools; are indivisible, according to Vrihaspati, but if no other property remain, must be sold, and the price of them must be distributed.

4. But Bhrign declared that whatever customary law of country, a class or tribe, a company of merchants and the like, or of a town, should be alleged and proved, the distribution of an inheritance must respectively be made according to to that custom..... 178 *e*

VAMANA PURANA.—In whatever country, whatever usage has passed through successive generations, let not a man there disregard it; such usage is law in that country..... 178 *e*

MITAKSHARA.—Partition (vibhaga) is the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate..... 186 *a*

NAREDA SUTRA.—Those by whom such matters are publicly transacted with their co-heirs may be known to be separate, even without written evidence..... 188 *d*

SMRITI CHANDRIKA.—Vide 179 *e*.

JAGUNNATHA.—II. D. 3rd 504.

Again, the people know whether these co-heirs have separated their preparation of food by previous agreement or not. Again, do the peasants deliver to them, severally, the provisions and other dues from their village? Hence also a principle of decision may be deduced..... 188 *e*

MENU.—And Entered Vide 177 *a* and 118 and 174.

MITAKSHARA.—Entered Vide 173 and 176..... 118 *f*

NAREDA SUTRA.—Gift and acceptance of gift, cattle, grain, house, land, and attendants, must be considered as distinct among separated brethren, as also diet, religious duties, income, and expenditure..... 189 *a*

Vide 183 *b*
Vide 183 *b*
Vide 179 *e* & 183 *b*

VYAVAHARA MAYUKA.—Yajnyawalkya states the modes of decision in case of denial of partition made by any one: "When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses; and by written proof, or by house or field separately possessed." From the term, separately possessed, we

Page.

must understand it of house or land separately given (to each) from the connexion between the adjective, and the thing denoted by it. Nareda also says, "If a question arise among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by separate transaction of affairs..... 189 *a*

V. M. Vide 179 *e*

SMRITI CHANDRIKA.—3 to 6 and 16·3 and 4. vide 183 *b*.

5. If it be asked, how these circumstances furnished evidence in favour of partition, the same author states: "The religious duties of unseparated brethren are single. When partition indeed has been made, religious duties become separate for each of them."..... 189 *a*

6.—Vide 182 *a*.

16.—Vide 179 *e*.

VRIHASPATHI.—Whatever share is enjoyed by each, let not that be contested; if he subsequently dispute a distribution, which was made with his own consent.

2. He shall be compelled by the king to abide by his share, or be amerced if he persist in contention..... 189 *c*

Vide 179 *e*.....189 *e* & 190 *b*

YAJNYAWALKYA.—It is declared, that brethren, husband and wife, father and son, cannot become sureties for each other before partition, nor reciprocally lend *their joint property*, nor give evidence for each other in matters relating to the common stock.....188 189 *e* & 190 *a*

NAREDA.—An undisputed debt of the grand-father, which has been successively due by him and his sons, but has remained undischarged by them, shall be paid by his grand-sons; but it is not recoverable from a person who is fourth in descent from the debtor..... 188

NAREDA.—A debt contracted before partition by an uncle, or a brother, or a mother, for the support of the family, all the parceners or joint tenants shall discharge..... 189 *f*

CATYAYANA.—Among persons jointly and severally bound for a debt, whoever is found, may be compelled to pay that debt; the son of one long absent abroad, may be compelled to pay the whole debt, but the son of one deceased need only pay his father's share..... 189 *f*

MENU.—When all the debts and wealth have been justly distributed acording to law, any property, that may afterwards be discovered shall be subject to a similar distribution..... 189 *f*

Vide 185.

Page.

MITACSHARA SABADHINI AND BALAMBHATTA.—Partition is the adjustment, of divers rights. The adjustment, or special allotment severally, of two or more rights, vested in sons or others, relative to the whole undivided estate, by referring or applying those rights to parcels or particular portions of the aggregate; is what the word 'partition' signifies. Sabodhini and Balam Bhatta..... 191 *a*

DAYABHAGA.—The answer is: partition consists in manifesting (or in particularizing) by the casting of lots or otherwise, a property which had arisen in lands or chattels, but which extended only to a portion of them, and which was previously unascertained, being unfit for exclusive appropriation, because no evidence of any ground of discrimination existed.

Or partition is a special ascertainment of property, or making of it known (by reference of a particular share to a particular person.) 191 *b*

MITACSHARA.—Thus, since the phrase "without detriment to the father's estate" is in every place understood; what is obtained by simple acceptance, without waste of the patrimony, is liable to partition. But, if that were not understood with every member of the text, presents from a friend, a dowry received at a marriage, and other particular acquisitions; need not have been specified..... 187 *a*

Vide 174 *c* & 178 *b*.

NAREDA.—Vide 174 *b*.

MITACSHARA ON JUDICATURE.—But it is now declared, that possession is evidence when accompanied by the five following conditions, a title, length of time, continuity, non-interruption, and the knowledge of the adverse party; according to the text, "Possession is five-fold, titled, long, continuous, uninterrupted, and known to the adverse party."..... 187 *b*

MITACSHARA.—It is settled that whatever is acquired at the charge of the patrimony, is subject to partition. But the acquirer shall, in such a case, have a double share, by the text of Vasishtha. "He, among them, who has made an acquisition, may take a double portion of it."... 191 *c*

DAYABHAGA.—Vide 174 *c*..... 191 *c*

MENU.—Vide 75 *a*..... 193 *a*

DAYABAGA.—Not so: for the right of the eldest (to take charge of the whole) is pronounced dependent on the will of the rest. Thus Nareda says: "Let the eldest brother, by consent, support the rest, like a father; or let a younger brother, who is capable, do so: the prosperity of the family depends on ability." By consent of all, even the youngest brother, being capable, may support the rest. Primogeniture is not a positive rule. For Menu declares: "Either let them thus live together, or let them live apart for the sake of religious

Page.

merit: since religious duties are multiplied apart, separation is, therefore lawful. By the terms "together or apart" and "for the sake" he shows it optional at their choice..... 193 *a*

DAYACRAMA.—The alleged power of sons to make a partition, when the father is incapable of business (by reason of extreme age &c. has been asserted through ignorance of express passages of law (to the contrary.) Thus Harita says: "while the father lives, sons have no independent power in regard to the receipt, expenditure and bailment of wealth. But, if he be decayed, remotely absent, or afflicted with disease, let the eldest son manage the affairs as he pleases." So Sankha and Likhita explicitly declare: "If the father be incapable, let the eldest manage the affairs of the family, or, with his consent, a younger brother conversant with business. Partition of the wealth does not take place, if the father be not desirous of it, when he is old, or his mental faculties are impaired, or his body is afflicted with a lasting disease. Let the eldest, like a father, protect the goods of the rest; for (the support of) the family is founded on wealth. They are not independent, while they have their father living, nor while the mother survives."..... 193 *b*

Vide 173 *a*..... 193 *a*

SMRITI CHANDRIKA.—28 and 29.

Now, from the digression; the use of the phrase "free from defect" in the text of Devela, para 23, serves to indicate that where a father labors under a defect, the sons become independent of him. It must consequently be understood, that even where a father is alive, if he be disqualified, independence in respect of the receipt and expenditure of the wealth becomes vested in the eldest son, and that the other sons are to remain under his control. Hence, Cankha and Likhita, "Should the father be incapable, let the eldest manage the affairs of the family, or with his consent, a younger brother (Anantara) conversant with business."

29. With his consent. With the consent of the eldest son who then possesses the independent power. Younger brother "Anantara" signifies generally a brother of the eldest (whether he be the next younger brother or not), competency to transact business and not seniority of birth being here essential. The incapability contemplated by the above text in the father is decay, and the like..... 193 *a*

NAREDA SUTRA.—Vide 174 *b*

Vide *a*..... 193 *b*

MITACSHARA.—Ch. I. S. V.

10. Consequently the difference is this: although he have a right by birth in his father's and in his grand-father's property;

Page.

still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property: but since both have indiscreminately a right in the grand-father's estate, the son has a power of interdiction (if the father be dissipating the property.)..... 194 *a*

MITACSHARA.—28 and 29.

28 vide 119.

The meaning of that text is this: while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable..... 194 *b*

VYASA.—A single parcener ought not, without the consent of his co-parceners, to sell or give away immoveable property of any sort which the family hold in co-parcenery..... 194 *b*

VYASA.—But at the time of distress, for the support of his household, and particularly for the performance of religious duties, even a single co-parcener may give, mortgage, or sell the immoveable estate..... 194 *b*

VYAVAHARA MAYUKA.—Vide 120..... 195 *a*

DAYABHAGA.—The participation of one, who arrives after the distribution of the estate, is next declared. On this subject Vrihaspati says, "Whether partition have, or have not, been made; whenever an heir appears, *he shall receive a share of whatever common property there is.* Be it debt, or a writing, or house, or field, which descended from his parental ancestor, he shall take his due share of it, when he comes, even though he have been long absent."..... 197 *a*

DAYAKRAMA SANGRAHA.—Vrihaspiti declares: "Whether partition have or have not been made, whenever an heir appears, *he shall receive a share of whatever common property there is.*"..... 197 *a*

MENU.—Vide 173 *a*..... 197 *a*

YAJNYAWALKYA.—In a partnership among traders who carry on business with a view to gain, let the profit and loss be distributed to each according to his share in the stock, or according to special agreement. 198 *a*

VYAVAHARA MAYUKA YAJNYAWALKYA.—"A man of crooked ways let the other partners expel without profit; and let a partner unable to act, appoint another man to act for him;" "If one partner does what the others forbid, or disapprove, or if he be negligent, (in doing

Page.

what they allow), and the (common) property be injured, he shall make it good; but he who preserves it from (robbers or other) misfortune, shall receive a tenth part of it (as his reward.)"..... 198 *a*

MENU.—Vide 173 *a*..... 198 *b*

MENU.—The eldest brother may take entire possession of the patrimony; and the others may live under him, as they lived under their father, unless they choose to be separated..... 198 *b*

SANCHA AND LICHITA :—Willingly let them live together; by union they exhibit thrift..... 198 *b*

MITACSHARA.—27 vide 33.
28 „ 119.
29 „ 194.
10 „ 194..... 198

VRIHASPATI.—A man may give what remains after the food and clothing of his family : the giver of more, who leaves his family naked and unfed, may taste honey at first, but shall afterwards find it poison.

2. Of houses and of land, acquired by any of the seven modes of acquisition, whatever is given away, should be delivered, distinguishing land as it was left by the father, or gained by the occupier himself.

3. At his pleasure he may give what himself acquired; a pledge must be disposed of by the law of pledges, or subject to redemption; but of property acquired by marriage, or inherited from ancestors, not every gift subsists.

4. But if what is acquired by marriage, what has descended from an ancestor, or what has been gained by valour, be given with the assent of the wife, of the co-heirs, or of the king, the gift has validity.

5. Heirs have a lien equally on the immoveable heritage, whether they be divided or undivided; and a single parcener has no power to give, pledge, or sell the whole..... 198 *b*

VYASA.—vide 194 *b*..... 198 *b*
Do. vide 194 *b*..... 198 *c*
Do. vide 194 *b*..... 198 *d*

VYAVAHARA MAYUKHA NARADA.—" What is bailed for delivery, what is lent for use, a pledge, joint property, a deposit, a son, a wife, and the whole estate of a man who has issue living, the sages have declared unalienable, even by a man oppressed with grievous calamities, and (of course), what has been promised to another." Now as a man has no property in his wife or son, it is only a repetition of the prohibition against their alienation, in conformity to the Vedas. ' Neither between, nor in the heavens above.' From this, and from the law of Yajnyawalkya : " In distress for (the maintenance of) the family, (or,

Pages.

the family not opposing the gift, on account of poverty), property may be given away, except a wife and son." The purport of the above is confirmed by the reservation of a wife and son. The non-existence of property in a wife or son has been already examined in the discussions on property..... 198 *e*

MITACSHARA.—Entered in 119 and 194 *b*..... 198 *f*

MITACSHARA.—Entered in 119 and 194 *b*.....199 *a, b, c*

VYAVAHARA MAYUKHA.—vide 2 and 120..... 200 *a*

MENU.—VIII 165 vide 123..... 200 *a*

167. Should even a slave make a contract in the name of his absent master for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it..... 200 *a*

MENU.—vide 119 *d*..... 200 *b*

MENU.—vide 177 *a*.....201 *a & b*

MENU.—vide 123 *b*..... 202 *a*

VYAVAHARA MAYUKHA.—vide 120..... 202 *a*

MENU.—' A gift or sale, thus made by any other than the true owner, must, by a settled rule, be considered, in judicial proceedings, as not made..... 205 *a*

MITACSHARA.—28 Vide 119.

29. Vide 194..... 205 *a*

CATYAYANA.—Let the judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner..... 205 *a*

VISHNU.—A debt of which payment has been previously promised, or which was contracted by any person for the behoof of the family, must be paid by the house-keeper..... 206 *a*

CATYAYANA.—What has been borrowed for the benefit of the family, or during distress, (while the principal was disabled, seized by the king or afflicted with decease or in consequence of a foreign invasion).

2. Or for the nuptials of his daughter, or for funeral rites; all such debts contracted by one of the family, must be discharged by the chief of that family..... 206 *a*

NAREDA.—Vide 188..... 206 *a*

MENU.—' Should even a slave make a contract in the name of his absent Master for the behoof of the family, that Master, whether in his own country or abroad, shall not rescind it..... 206 *a*

MITACSHARA.—27 vide 33..... 209 *a*

NAREDA.—If they severally give or sell their own undivided shares, they may do what they please with their property of all sorts, for surely they have dominion over their own.....209 *b & c*

Page.

DAYAKRAMA SANGRAHA.—Ch. XI.

7. Since therefore there is no general property of parceners in the whole estate, it is fallacious to suppose, that a plurality of owners constitutes community, and community must there be considered as meaning the state of not being separated. For as propriety, exists in the common property, even before partition, there is nothing to prevent the gift or other alienation by a parcener of his own share, even at that time. This is the opinion entertained by the author of the Dayabhaga, who maintains a partial right to a certain portion (of the estate ascertainable by partition) vested in each individual owner. Accordingly Nareda says: "When there are many persons sprung from one man, who have duties apart and are separate in business, and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth," and thereby, shows that in transactions about to be concluded by one parcener, he has the power to give or otherwise dispose of his own share, without the consent of the rest.

8. It should not be said, that this text refers to a state of separation, for since the want of ownership (by one parcener in the portion allotted to another) is in that case clearly determined, the consent of either to the transactions of the other, is totally out of the question. Such being the case, the text (of Vrihaspati above cited) which enumerates common property as not being a subject of donation, must be considered merely in the light of a prohibition, and not as meant to invalidate the transfer.—It is thus stated in the Smriti Sagura and other books.

9. Therefore, a gift by a parcener of his own share of the common property is valid, whether such gift have been made antecedent, or subsequent to partition.....209 *b* & *c*

MITAKSHARA.—The term plaintiff or complainant includes the sons and grand-sons of those persons, their interests being equally involved; so also is a constituted agent included, because his appointment creates in him a similar interest, as appears from the following text: "A person being appointed by the Plaintiff or Complainant, or deputed by the defendant, or person complained against, who acts on behalf of his principal, suffers defeat or success." The principal participates in the success or failure of his representative..... 209 *d*

MENU.—165 vide 123..... 210 *a*

NAREDA.—What is bailed for delivery, what is lent for use, a pledge, joint-property, a deposit, a son, a wife, and the whole estate of a man who has issue living.

Page.

2. The sages have declared unalienable even by a man oppressed with grievous calamities, and of course, what has been promised to another..... 212 *a* & 213 *a*

VRIHASPATI.—The prohibition of giving away is declared to be eight-fold: a man shall not give joint-property, nor his son, nor his wife, with their assent in extreme necessity, nor a pledge, nor all his wealth if he have issue living, nor a deposit, nor a thing borrowed for use, nor what he has promised to another..... 212 *a* & 213 *a*

DACSHA.—Joint-property, deposits for use, bailments in the form called Nyasa, pledges, a wife, her property, deposits for delivery, bailments in general, and the whole of a man's estate, if he have issue alive.

2. Are things which the learned have declared unalienable even in times of distress: the man who gives them away is a fool, and must expiate the sin by penance..... 212 *a* & 213 *a*

NAREDA.—Vide 212 *a* & 213 *a*..... 213 *b*
VRIHASPATI.—Vide 212 *a* & 213 *a*..... 213 *b*
NAREDA.—Vide 209 *b* & *c*..... 213 *c*

VYAVAHARA MAYUKHA.—As for this text: "The father is master of all gems, pearls, and corals; but neither the father nor the grand-father, is so of the whole immoveable estate," it also means the father's independence, only in the wearing and other (use) of ear-rings, rings, (&c.), but not as far as gift or other (alienation): neither is it with a view to the cessation of the cause of his ownership on the production of a son. This very meaning is made manifest also by (the text) noticing (only) gems, and such things as are not injured by use. Even so, this text: "Though immoveables and bipeds have been acquired by the man himself, a gift or sale of them should not be made without convening all the sons," is only a prohibition against their gift, sale, or the like, not against the use of them..... 213 *d*

MITACSHARA.—Vide 33..... 213 *d*
NAREDA.—Vide 209 *b* & *c*..... 213 *e*
DAYACRAMA SANGRAHA.—Vide 209 *b* & *c*..... 213 *e*
VYAVAHARA MAYUKA.—Vide 198 *e*..... 213 *f*
MITACSHARA.—Vide 33..... 213 *f*
NAREDA.—Vide 212 *a* & 213 *a*..... 213 *f*
VRIHASPATI.—Vide Do..... 213 *d*
DACSHA.—Vide 212 Do..... 213 *d*

VYAVAHARA MAYUKHA.—According to Dharecvara: Acharya 'The ownership of sons and the rest, in the wealth of the father, is not generated previously during his life, but is produced by partition.' And the author of the Smriti Sangraha says the same. But it is not so; for, from the plain sense of this text; "Even by birth, ownership in

Page.

wealth is obtained," and other similar ones, it is evident, that ownership in the father's wealth depending on the filial relation it is generated even by the production of a son. And (the same results) from the text of Yajnyawalkya : " For the ownership father and son is the same, in land which was acquired by the grand-father, or in a corody, or in chattels which belonged to him." ' And this does not mean, that the reason of the acquisition of ownership is found in the grand-father's death, and not in the production of a son,' for (if it did), such ownership would be wanting, in case no grand-son were to be born to him up to the time of his death. In this way therefore, either the word grand-father is of no use (in the argument); or it follows á fortiori (prasakteh) that there is no equal ownership in (property) acquired by the great grand-father, and other (more remote ancestors). And the argument of ' cause and effect,' might here be repeated..... 214 *a*

MITACSHARA.—Vide 33.....214 *a*

SMRITI CHANDRIKA.—This is not right. Even if there should be no such act as alienation at will, a thing may be called capable of being alienated at will. Accordingly, Bhavanatha, in his Naya Viveka, says " That which was acquired by one is to him capable (of being alienated at will"). The particle " cha," used in the above passage of Bhavanatha, is intended to denote that, in his (Bhavanatha's) opinion, capability to be alienated at will admits of being defined just in the same manner as " Svatva" or property does. To avoid supposing that if so, a property obtained by theft would be also capable of being alienated at will by the thief, the same author (Bhavanatha) adds, " The modes of acquisition by birth &c., are the modes recognised by popular practice." The meaning is that such acquisitions only as are made by birth, purchase, partition, seizure, finding, and the like, are recognised by the world, and they alone confer ownership and not an acquisition made by theft or the like. The particle " Cha" used in the above passage of Bhavanatha is intended to denote the practicability of refuting fallacious reasoning. If it be asked then, what rule is there to show that such a mode of acquisition has been recognised by the world, and such a mode has not, the same author states, " A Smriti or code of law, like grammar and the like, has been framed in order to show what are the rules established in the world from the earliest period." The purport is that such modes of acquisition alone as have, from the beginning, been recognised by the world, are capable of conferring ownership ; that they are necessary to be learnt in order to ascertain how property can be acquired in both worldly and religious matters ; and that, therefore, with the object of showing what are the modes of acquisition thus recognised by the world, the institutes of law (Dhurma Smriti) framed by Gautama and others set forth, " An owner is by inheritance, purchase, partition, seizure or

Page.

finding. Acceptance is for a Bramin an additional mode, conquest for a Kshatrya, gain for a Vaicya or Sudra," in the same way as a grammar does show what are the correct expressions in a language as long acknowledged in the world.

INHERITANCE.—*Gain by inheritance; that is, a right which a son or the like acquires by birth over property of the father or the like. Gutama explains in the following passage the origin of the son's title to the paternal estate. "The venerable teachers direct that ownership to wealth is acquired by birth alone." By birth alone, by the very formation of the fœtus in the mother's womb.*

PARTITION.—Partition which confers a special or exclusive ownership on the sons, and the like, over the paternal Estate.

Seizure is the appropriation of water, grass, wood, and the like, not previously appertaining to any other (person as owner.) Finding is the discovery of a hidden treasure, and the like.

If these reasons exist, the son &c., the purchaser, the sharer, the seizer, and the finder become respectively the owners of the property derived from the father &c., sold, divided, seized, and found. Acceptance is an additional mode of acquisition exclusively appertaining to a Bramin. Likewise, for a Kshatriya, what is obtained by victory is peculiar. Nirvichtam or what is gained in the way of hire by agriculture; and the like, is for a Vaicya peculiar, and so for a Sudra, Nirvishtam, or what is earned in the form of wages by doing service to the pregenerate. Thus, the meaning of the law of Gautama, prescribing the several modes of acquisition, must be understood. What Sangrahakara has stated under the text "one cannot be the owner of a property simply because he is in possession of it, &c., para 24," and what Dhâraiswara Curi has propounded, must all be considered as useless. The inconsistency of the text of Dèvala, "Sons have not ownership (Svamiem) while the father is alive and free from defect, para. 28," with the passage, para 18 of Cankha, which declares sons to have acquired a right by birth to their father's estate, must be reconciled only by construing the former text in a manner not strictly literal, (that is, by construing the term "Asnamiem" as "Asvatantriem," as shown in para 23). Thus much is sufficient to meet the objections of the opponent.

MADHAVYA.—Menu has declared the time of partition :—"After the death of the father, and after the death of the mother, the brothers having come together should divide equally the paternal wealth; while the two are alive they are powerless to do so."

C. "After the death of the father;" (*i.e.*) is the time of partition of the wealth of a father.

Page.

"After a mother;" (*i.e.*) is the time of partition of the wealth of a mother.

And hence it has been said that after the father's (death) although the mother be alive, partition of the father's wealth is to be made; so also after the mother's (death), partition of her property is to be made although the father be alive; because in the case of the partition of wealth of either of the two after the death of both, it would be useless to specify the time. And this has been declared by the author of the summary:—"The partition of the father's wealth should take place though the mother be alive, for the mother has not by independence power to possess apart from her husband; so also though the father be alive, partition of the mother's wealth (should take place); for if there be offspring, the husband is not master of Stridhana."

C. The meaning is, as on the death of her husband the wife of a father has not ownership by independence in the wealth of her husband; so on the death of the wife if there be offspring, the husband is not owner of his wife's property; and for this reason, though either of the two be alive, the partition of the property of the other is proper.

Hence we conclude that while both of them are alive, the sons have no independent power as regards partition of their acquired wealth.

So Cankha says:—"Let not sons make partition of wealth while the father is alive, *although after their birth the sons have ownership in their father's wealth*; Yet as long as their father is alive, let them not divide his wealth, for they are not competent to carry out partition by reason of their want of independence in religious duty."

C. "Want of independence;" (*i e.*) want of independence as to receiving and giving. So Harita has said:—"While the father lives, the sons independent power in receiving wealth, relinquishment of it, or fines." "Receiving of wealth;" (*i. e.*) enjoyment of wealth. "Relinquishment;" (*i. e.*) expenditure.

"Fine;" (*i. e.*) of Servants, &c., for punishment. "Want of independence in religious duties;" (*i. e.*) not being engaged in sacrifice, study &c.

6. Nareda has mentioned another time for partition:—"After this the sons may divide the father's wealth equally, viz., when the mother's courses have ceased, and the sisters are married, and when the father's desire has ceased, or he has no longer care for worldly affairs."

Cankha also says:—"Even against the father's will there may be partition, if he be old, perverse in mind, or affected with chronic disease." C. The meaning is; "against the father's will," (*i. e.*) if the father does not desire division.

Page.

Old ; (*i. e.*) if he be very old.

" Perverse in mind ; " (*i. e.*) not in a usual state of mind. " Affected with chronic disease ; (*i. e.*) seized by an incurable disease. In such case there is partition at the will of the sons alone." The mention of chronic disease also includes excessive anger &c., Hence Nareda says : " A father who is diseased or enraged, or whose mind is devoted to sensual objects, or who acts contrary to the Castra has no power in partition."

Yajnyawalkya has mentioned a peculiarity in the case of equal partition being made by the father:—" If he makes the shares equal, then the wives are to have equal shares if they had know Stridhana given them by their husband, or father-in-law." " If the father of his own accord makes the sons equal sharers, then the wives to whom Stridhana has not been given are to be made equal sharers with the sons ; but if Stridhana has been given them, he should give them a half ;" (*i. e.*) they are sharers in the half of the share of a son..... 214 *a*

DAYABHAGA—15. This text is an answer to the question, why partition among sons is not authorized, while their parents are living : namely " because they have not ownership at that time."

16. It should not be argued, that the text intends want of independence, like another passage of the same author, concerning acquisition by a wife or son : for there is no evidence of property then vested ; but, in the other instance, dependence is rightly supposed to be meant, since property is suggested by the phrase " What they earn" or acquired.

17. Besides it would contradict revealed law, if these persons had not ownership even in that which is by them earned ; since religious rites, enjoined by the holy rite, and which must be effected by means of their own wealth, would be prevented.

18. Dèvala, too, expressly denies the right of sons in their father's wealth. " When the father is deceased, let the sons divide the father's wealth : for sons have not ownership while the father is alive and free from defect."

19. Besides, if sons had property in their father's wealth, partition would be demandable even against his consent ; and there is no proof, that property is vested by birth alone ; nor is birth stated in the law as means of acquisition..... 214 *b*

MITACSHARA—26 to 29.

26. As for the alleged disqualification for religious duties which are prescribed by the Veda, and which require for their accomplishment the use of wealth. (§ 18) sufficient power for such pur-

Page.

poses is inferred from the cogency of the precept (which enjoins their performance)..... 214 *c*

27 vide 33
28 vide 119
29 vide 194..... 214 *c*

MITACSHARA—Section V. 10. Consequently the difference is this : although he have a right by birth in his father's and his grand-father's property ; still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property : but, since both have indiscriminately a right in the grand-father's estate, the son has a power of interdiction (if the father be dissipating the property.)..... 214 *c*

DAYABHAGA—Ch. I. 1. Partition of heritage, on the subject of which various controversies have arisen among intelligent persons (not fully comprehending the precepts of Menu and the rest) should be explained for their information. Hear it, O. Ye wise !

12. The answer is this : since it is the practice of all people to call an estate their own, immediately after the demise of their father or other predecessor ; and the right of property is acknowledged to vest without partition in the case of an only son ; the demise of the relative is the cause of property, consequently there is no room for any misconstruction.

25. Or the survival of the son, at the time of his father's demise, may constitute his acquisition. Besides, in the case of goods left by a brother or other relative, the property of the rest of the brethren, or other heirs, must, however reluctantly, be acknowledged to arise either from his death or from the survival of the rest at the time of his decease.

26. Hence (that is, because property is not vested in sons, while the father lives, or because property is not by birth, but by survival, or because the demise of the ancestor is a requisite condition,) the passage before cited, beginning with the words " after the (death of the) father," being intended to declare property vested at that period (namely at the moment of the father's decease) recites partition which of course then awaits the pleasure (of the successor.) For it cannot be a precept, since the same result (respecting the right of partition, at pleasure,) was already obtained (as the necessary consequence of a right of property.)

31. Mere demise is not exclusively meant : for that intends also the state of a person degraded, gone into retirement, or the like ; by reason of the analogy as occasioning an extinction of property..... 215 *d*

Page.

MITACSHARA—Ch. I. S. I. 27 entered in 33 *a*..... 215 *e*
Do. 27 entered in 33 *a*.....215 *f* & *g*
Do. 28 entered in 119
Do. 29 entered in 194

VYAVAHARA MAYUKA—Ch. IV. S. I. V. entered in 213 *d*.....215 *f* & *g*
NAREDA—I Dig. B. II. Ch. IV. S. I. V. 6 entered in 209 *b* & *c*..... 216 *a*
DAYAKRAMA SANGRAHA—Ch. XII. S. I 9 entered in 209 *b* & *c*..... 216 *a*
MITACSHARA—Ch. I. S. I. 27 entered in 33 *a*..... 219 *h*

MITACSHARA.—The following passage : " Separated kinsmen, as those who are unseparated, are equal in respect of immoveables; for one has not power over the whole, to make a gift, sale or mortgage :" must be thus interpreted : ' among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common: but among separated kindred, the consent of all tends to the facility of the transaction, by obviating any future doubt, whether they be separated or united : it is not required, on account of any want of sufficient power, in the single owner; and the transaction is consequently valid even without the consent of the separated kinsmen..... 220 *a*

MITACSHARA.—Partition (Vibhaga) is the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate..... 222 *a*

NAREDA.—I Dig. B II Ch. IV S I V. 6 in 209 (*b* & *c*.)..... 214 *d* & *e*

JAGANNADA.—I Dig. 403 It should not be objected, that the assent of co-heirs should be established under the authority of the text, as a necessary association for the disposal of another's right in undivided immoveable property: thus, without the union of all the requisite causes, the effect of conferring property on another does not take place. Since the text may be pertinent in the sense above mentioned,it is wrong to impose the difficulty of establishing such an association. Herein Srikrishna Tercalancara concurs. But if a parcener, without the assent of his co-heirs, give the whole joint property, the gift is null; for the joint property of all cannot be divested by the act of one.

It is questioned whether his own property be, or be not, anulled by the act of a single parcener. It should not be said that his own property is not annulled, because the gift, being improperly made, is in it's own nature imperfect, and is void as the act of a man partly destitute of ownership. There is nothing to prevent the annulling of his own property, since the gift, which he himself makes with the intention of annulling the rights of all the parceners in that chattel, is the act of an owner, of whom property is predicable. Consequently, the ownership of the giver appears in

Page.

this instance to be alienable : but the ownership of the rest subsists in full force. The meaning of ancient authors, who hold a gift of joint property to be void, is the same. But a parcener's gift of his own share is valid. All the brothers have each their respective predicable property in all the effects..... 214 *d* & *e*

MENU.—He who sells the property of another man, without the assent of the owner, the judge shall not admit as a competent witness, but shall treat as a thief, who pretends that he has committed no theft.... do.

VYASA—entered vide 194 *b*..... do.

MITACSHARA—Ch. I. S. I. 27 in 33 *a*..... 224 *b*

VYAVAHARA MAYUKA.—Brihaspati declares partition in some cases without his wish : "The father and sons, are equal sharers in houses, and lands, derived regularly from ancestors : but sons are not worthy (in their own right,) of a share in wealth acquired by the father himself, when the father is unwilling :" From which it results, that sons are worthy of a share in property, acquired by the grand-father or other (ancestor), even though the father do not wish it..... 224 *b*

MITACSHARA—Ch. I. S. I. 27 in 33 *a*..... 224 *a*

Do. 28 in 119

Do. 29 in 194 *b*.

MITACSHARA—Ch. I. S. I. 27 in 33 *a*..... 215 *b*

MITACSHARA—Ch. I. S. VI. 5 & 7..... 215 *c*

(5) The meaning of the text is this : one, born previously to the distribution of the estate, has no property in the share alloted to his father and mother who are separated (from their elder children) ; nor is one, born of parents separated from their children, a proprietor of his brother's allotment.

(7) But the son, born subsequently to the separation, must, after the death of his father, share the goods, with those who re-united themselves with the father after partition ; as directed by Menu ; "or he shall participate with such of the brethren, as are re-united with the father."..... 215 *c*

MITACSHARA—Ch. I. S. VI. 10 entered in 194 *a*.

SMRITI CHANDRIKA—Ch. VIII. 17,18, & 20..... 215 *c*

17. If it be asked how, in the case of one whose father is alive, he obtains partition of his (deceased) grand-father's property with his father, Katyayana says : "Grand-father's property vests equally in both the son and father." Vyasa too :—"A father and his sons are entitled to share equally the house and land descended from ancestors." Brihaspati, also : "Of property acquired by the grand-father, whether moveable or immoveable, equal shares are ordained for both the father and the son."

Page.

18. Yajnyawalkya on the same subject: "The ownership of a father and son is the same in land which was acquired by the grand-father or in a corrody (Nibandha) or in a chattel (Dravyam) which belonged to him."

A corrody (Nibandha) signifies a permanent allowance received from saleable articles, in virtue of an agreement or promise. The expression "The ownership of a father and son is the same" used in the above passage of Yajnyawalkya must be understood to mean that a father and son shall have equal shares—otherwise, the import of the passage cannot agree with the texts previously quoted, namely, those of Katyayana, Vyasa, and Brihaspati.

20. Some give the expression "The ownership of father and son is the same" used in the above passage of Yajnyawalkya, the full force which the terms convey, and hold that a partition of the grand-father's property takes place even at the will of the grand-son above, and that a father is not, of his own authority, competent to make a gift or the like of hereditary property; the grand-son (of the deceased), in the case of such property, possessing an equal ownership with the father. Such a construction is acceptable, it being pertinent and Vishnu, too, declaring: "In the case of grand-father's property, the ownership of a father and son is equal." ..... 224 *b*

MADHAVYA.—Gautama with respect to this has mentioned a peculiarity; "Stridhana belongs to daughters who are not married or betrothed." The meaning is, if there are married and unmarried daughters, the mother's wealth belongs to the unmarried ones; if there are married daughters, both with and without property, then it belongs to those without property ..... 215 *c*

MITACSHARA—Ch. I. S. I. 27 entered in 33 *a* ..... 215 *c*

SMRITI CHANDRIKA—Ch. VIII. 22, 23, 25, & 26. ..... 234 *a*

22. Katyayana, however, says: "A son has no ownership (Svamiem) over the self-acquisition of the father."

But this passage must be understood to indicate simply the incompetency of the son to enforce at his own will a partition of such property during the life-time of the father. It cannot be taken in its literal sense. There is thus no contradiction.

23. Vyasa on this subject, is explicit in its terms: "Sons cannot claim a partition of wealth acquired by their father against their father's will."

25. The same author also defines independent power, "He may give the wealth away at his pleasure or enjoy it himself (Bhogam Kureyat), but after his extinction, his sons are pronounced entitled to equal shares."

Page.

26. The purport of the above passage is that the father, even without his son's permission and on the strength of his own independence, is competent to make a gift or the like of his self-acquired property, or make an unequal portion of it in the manner and in the instances described in the chapter treating of partition during life-time of the father.

Do. ..... 234 *b* & *c*

DAYABHAGA—Ch. XI. S. I. 3, 4, 5 & 55.

3. By these seven texts Vrihaspati having declared, that the whole wealth of a deceased man, who had no male issue, as well as the immoveable as the moveable property, the gold and other effects, shall belong to his widow, although there be brothers of the whole blood, paternal uncles, (daughters), daughter's sons and other heirs; and having directed, that any of them, who become her competitors for the succession, or who themselves seize the property, shall be punished as robbers; totally denies the right of the father, the brothers and the rest to inherit the Estate if a widow remain.

4. In like manner Yajnyawalkya says, "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow-student: On failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue. This rule extends to all persons and classes. Thus affirming the right of the last mentioned on failure of the preceding, the sage propounds the succession of the widow in preference to all the other heirs.

5. So Vishnu ordains: "The wealth of him, who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother; on failure of her, it goes to the brothers; after them, it descends to the brother's sons; if none exist, it passes to the Kinsmen (bandhu;) in their default, it devolves on relations (sakulya): failing them, (it belongs to the pupil :) on failure of these, it comes to the fellow student: and for want of all those heirs, the property escheats to the king; excepting the wealth of a Brahmana."

55. Therefore the interpretation of the law is right as set forth by us..... 234 *b* & *c*

MITACSHARA—Ch. I. S I. 27 entered in 33 *a*..... 234 *d*
VYAVAHARA MAYUKA—Ch. IV S. VII 1 & 2. entered in 185 *a*. ..... 234 *f*
DAYABHAGA—Ch. VI. S. I. 3 entered in 174 *c*..... do.
MITACSHARA—Ch. I. S. IV. 2. entered in 185 *a*..... do.
VYAVAHARA MAYUKA—Ch: IV. S. VII. 2 entered in 178 *a*. ..... 235 *a*
DAYABHAGA—Ch. VI. S. 1. 3 entered in 174 *c*..... do.
MITACSHARA—Ch. I. S. IV. 2 entered in 185 *a*..... do.
MITACSHARA—Ch. I. S. IV 30 and 31..... 235 *b*

Page.

30. The author propounds an exception to that maixm. "But, if the common stock be improved, an equal division is ordained."

31. Among unseparated brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce, or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer.

MITACSHARA.—Thus, the phrase "without detriment to the father's estate" is in every place understood; what is obtained by simple acceptance, without waste of the patrimony, is not liable to partition. But, if that were not understood with every member of the text, presents from a friend, a dowry received, at a marriage, and other particular acquisitions, need not have been specified..... 235 *c*

DAYABHAGA.—Ch. VI. S. I. 1 to 5 entered in 174 *c* and 178 *b j*..... do.

MENU.—IX 208 entered in 174 *e*..... 235 *d*

YAJNYAWALKYA.—II Dig: B. V. Ch. V. V. 352 entered in 178 *a*..... do.

DAYABHAGA.—Ch. VI. S. I. 23 entered in 174 *c*..... do.

DAYAKRAMA SANGRAHA.—In like manner, when an acquisition is made by two persons; by the personal labor of the one, and by means of the wealth, and of the personal labor of the other, then the acquirer by means of personal labor alone, has one share, and the acquirer by wealth and labor has two shares, by parity of reasoning..... 236 *b*

VYAVAHARA MAYUKA.—Here also, in all these cases, indivisibility applies, only when no detriment has fallen on the parental estate, in acquiring, as well as superior knowledge, as wealth; for in case of detriment (to the estate, the acquisition) is even divisible. Even so, Katyayana says: "Yet Brihaspati has ordained, that wealth shall be partible, if it was gained by learned brothers who were instructed in the family by their father, or paternal grand-father, or uncles; and it is the same, if the wealth were acquired by valor, (with assistance from the family estate.)"..... 236 *c*

MITACSHARA.—Moreover the text above cited "The father is the master of the gems, pearls &c." (§ 21) is pertinent on the supposition of a proprietary right vested by birth. Nor is it right to affirm, that it relates to immoveables which have descended from the paternal grand-father: Since the text expresses "neither the father, nor the grand-father."This maxim, that the grand-father's own acquisition should not be given away while a son or grandson is living, indicates a proprietary interest by birth. As, according to the other opinions, the precious stones, pearls, clothes, ornaments and other effects, though inherited from the grand-father, belong to the father under the special provisions of the law; So, according to our opinion, the father has power, under the same text, to give away such effects, though acquired by his father. There is no difference..... 224 *c*

Page.

YAJNYAWALKYA.—Of precious metals or stones, of pearls, coral, and other moveables, the father has power to give or sell the whole; but neither the father, nor the grand-father, shall aliene the whole of his immoveable property..... 224 *c*

MITACSHARA.—Ch: I. S. IV. 2 entered in 185 *a*..... 240 *a*

MENU.—II. Dig. B. V. Ch. V. S. II. V. 345 and 348..... 240 *a*

345. Wealth acquired by learning, belongs exclusively to any one of the brothers who acquired it; so does anything given by a friend, received on account of marriage, or presented as a mark of respect to a guest.

348. What a brother has acquired by labour or skill, without using the patrimony, he shall not give up without his assent, for it was gained by his own exertion.

CATYAYANA.—What has been acquired by learning, after intructions received from a stranger, and a maintenance provided by one of a different family, is called wealth gained by learning.

2. What is gained by proving superior learning, after a prize has been offered by some third person, must be considered as the acquisition of a scholar, and ought not in general to be divided among co-heirs:

3. So what has been received as a gift from a pupil, as a gratuity for the performance of a sacrifice, as a fee for answering a question in casuistry, or for ascertaining a doubtful point of law; or what has been gained as a reward for displaying knowledge, or for victory in a learned contest, or for reading Vèda with transcendent ability:

4. Such wealth have the sages declared to be the acquisition of science, and not subject to distribution; and the law is the same in regard to liberal or elegant arts, and to increase of price from superior skill in them.

5. A prize which has been offered for the display of superior learning, and a gift received from a votary for whom a sacrifice was formerly performed, or a present from a pupil formerly instructed, Sages have declared to be the acquisition of sience: what is otherwise acquired, is the joint property of the co-heirs.

6. Even what is won by surpassing another in learning, after a stake has been deposited, Vrihaspati pronounces the acquisition of knowledge, and impartible:

7. What is obtained by the boast of learning, what is received by a pupil, or for the performance of a sacrifice, Bhrigu calls the acquisition of science..... 240 *a*

Page.

NAREDA.—Three sorts of wealth are in general not subject to partition; what is gained by valour, what is given by the kinsmen of a wife, and what is acquired by learning; and also any thing that has been received by the favour of a father, or other friend.

2. And this law is also observed in the case of him to whom any thing has been given by his mother, through affection, out of his own several property; for as a father, so has a mother power over her own..... 240 *a*

MITACSHARA.—Ch: I. S. IV. 2. entered in 185 *a*..... 225 *a*
Do. Ch: I. S. I. 28 entered in 119..... 240 *b*
Do. „ „ 29 „ „ 194. *b*.
Do. „ S. VI 10 „ „ 194. *b*.

MADHAVYA.—6 entered in 214 *a*..... 225 *a*

MENU.—If the debtor be dead, and if the money borrowed was expended for the use of his family, it must be paid by that family, divided or undivided, out of their own estate..... 227 *a*

MITACSHARA.—Ch: I. S. VI. 5 entered in 215 *c*..... 230 *a*
7 „ „ 215 *c*.
10 „ „ 194 *a*.

MITACSHARA.—Ch. I. S. I. 27 entered in 33 *a*..... 231 *b*
SMRITI CHANDRIKA.—Ch. VIII. 20 entered in 215 *c*..... 231 *b*
VYAVAHARA MAYUKA.—Ch: IV. S. IV. 4 entered in 223 *b*..... 231 *b*

13. Brihaspati, however, declares the right to only an equal share with his sons, even if there be only one, in property acquired by the grand-father: "In wealth acquired by the grand-father, whether it consist of moveables, or immoveables, the equal participation of father and son is ordained." Yajnyawalkya: "For the ownership of father and son is the same, in land which was acquired by the grand-father or in a corody, or in chattles (which belonged to him)." Katyayana: "When the father and the sons even, take all that, which has been made upon the common wealth, in equal shares, it is called a legal partition."

MADHAVYA.—6. entered in 214 *a*..... 231 *c*

MITACSHARA.—Ch: I. S. VI. 5 enterd in 215 *c*..... 231 *d*

6. Thus, whatever has been acquired by the father in the period subsequent to partition, belongs entirely to the son born after separation. For it is so ordained: "All the wealth, which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition: those, born before it, are declared to have no right."

8. When brethren have made a partition subsequently to their father's demise, how shall a share be allotted to a son born after-

Page.

wards ? The author replies " His allotment must absolutely be made, out of " the visible estate corrected for income and expenditure."

9. A share allotted for one who is born after the separation of the brethren, which took place, subsequently to the death of the father, at a time when the mother's pregnancy was not manifest, is " his allotment." But whence shall it be taken ? The author replies, " from the visible estate" received from the brethren, " corrected for income and expenditure." Income is the daily, monthly or annual produce. Liquidation of debts contracted by the father, is expenditure. Out of the amount of property corrected by allowing for both income and expenditure, a share should be taken and allotted to the (posthumous son.)

SMRITI CHANDRIKA—Ch. XIII. 1, 2, and 11 entered in 300 *e*..... 231 *d*

MADHAVYA.—Para 19 entered in 300 *e*..... 231 *d*

Do. ..... 231 *b*

MITACSHARA Ch : I. S. I. 27 entered in 33 *a*..... 232 *a*

MADHAVYA 15. But if it be asked, how does one whose father is alive share with his father the grand-father's property ? Vridha Brihaspati says : " Like shares have been declared for the father and the son in the case of moveable and immoveable property acquired by the grand-father."..... 232 *a*

Yajnyawalkya (says): "Land which has been acquired by the grand-father, a vibandha (grant), and property, in these let there be the same right to both the father and son." " Land" ; (*i. e.*) rice lands, &c. " Nibandha ;" such as, so many leaves of a bhara of leaves, or so many nuts of a bhara of betel-nuts." " Property ;" (*i. e.*) gold, silver &c., acquired by the grand-father by purchase and such means. 232 *a*

DAYABHAGA.—Ch : II 27-28-29..... 233 *a* & *b*

27. It should not be alleged, that by the texts of Vyasa ("A single parcener may not without consent of the rest, make a sale or gift of the whole immoveable estate, nor of what is common to the family." " Separated kinsmen, as those who are unseparated, are equal in respect of immoveables: for one has not power over the whole to give, mortgage, or sell it.") one person has not power to make a sale or other transfer of such property. For here also (in the very instance of land held in common) as in the case of other goods, there equally exists property consisting in the power of disposal at pleasure.

28. But the texts of Vyasa exhibiting a prohibition, are intended to show a moral offence: since the family is distressed by a sale, gift or other transfer, which argues a disposition in the person to make an illuse of his power as owner. They are not meant to invalidate the sale or other transfer.

Page.

29. So likewise other texts (as this, though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made by him, unless convening all the sons,") must be interpreted in the same manner. For here the words "should" "be made" must necessarily be understood.

DAYABHAGA.—Ch. I-13-14.18-19-26-30..... 233 *a* & *b*

13. Acquisition is the act of the acquirer; and one, who has the state of ownership dependent on acquisition, is the acquirer. Is not birth therefore, as the act of the son, rightly deemed his mode of acquisition? and have not sons, consequently, a proprietary right, during their father's life, (even without his being degraded or otherwise disqualified;) and not by reason of his demise? and therefore it is declared in some cases birth alone (is a mode of acquisition) as in the instance of a paternal estate.

14. That is not correct, for it contradicts Menu and the rest "After the (death of the) father and the mother, the brethren, being assembled, must divide equally the paternal estate: for they have not power over it, while their parents live."

18. and 19 entered in 214 *b*.

26. Entered in 215 *d*.

30. Hence the texts of Menu and the rest (as Dèvala § 18) must be taken as showing, that sons have not a right of ownership in the wealth of the living parents, but in the estates of both when deceased. One position is conveyed by the terms of the text; the other by its import.

MITACSHARA.—Ch: I. S. I. 28 entered in 119..... 233 *c*
Do. Ch: I. S. I. 29 entered in 194..... 228 *a*
Do. Ch: I. S. I. 26 entered in 214 *c*.
Do. Ch: I. S. VI. 10 entered in 194 *a*..... 228 *b*
Do. Ch: 1. S. 127 entered in 33 *a*..... 228 *b*
Do. „ 28 entered in 119.
Do. Ch: I. S. 1 28 entered in 119..... 229 *a*
Do. „ 29 entered in 194 *b*.
VYAVAHARA MAYUKA.—Ch: 1V S. VI..... 241 *a*

1. This settled, I return (to my subject) :

Katyayana states a distinction in partition of doubts: "The debt of the father, one incurred by a parcener himself, on account of the debts of the father, and one specially his own; debts so incurred, must be examined on a partition with the kinsmen." On account of the debts of the father, incurred for the sake of discharging the father's debts. Specially his own, (contradicted by other) than himself, for the maintenance of his family. The same author

Page.

says : "A debt contracted by a brother, a paternal uncle, or a mother, for the (support of the) family, must be fully discharged by the co-heirs, when partition is made."

2. The same author also says, in case the debt be less than the property: "But having given the debt (to the creditors), and what was bestowed through affection, let them divide the balance." Bestowed, promised, Nareda: "What remains, after discharging the father's donation, and after payment of his debts, may be divided by the brethren, so that their father continue not a debtor." The father's donation, what had been promised by the father. The same author says : what has been given for religious purposes, and through affection, and the debt which has been added by himself, that (and) the visible (estate), let them divide; (any other debt) is not to be given, out of the paternal estate. "The meaning is this : 'What has been given for religious purposes, as well as through affection; (that is) what has been added by the father himself, (that is) what has been made by himself; such debts (and the visible estate) they shall divide. Payment (dàna) is not (allowable) out of the paternal estate, of debts other than these.'

YAJNYAWALKYA.—If one of two or more parceners or undivided kinsmen contract a debt for the support of his family, and either die or be very long absent abroad, the other parceners or joint-tenants shall pay it. 241 *a*

NAREDA.—I. Dig : B. I. Ch : V. V. 181 entered in 189 *e* & *f* 190 *a*..... 241 *a*
Do. 1. Dig ; B 11 Ch ;IV. S. I. V. 6 entered in 209 *b* & *c*..... 241 *b*
DAYAKRAMA SANGRAHA.—Ch : XII. S. 1. 9 entered in 209 *b* & *c*..... 241 *b*
VRIHASPATI.—201.

VRIHASPATI.— The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or of wrath; or sums for which he was a surety, except in the cases before mentioned: or a fine, or a toll, or the balance of either..... 241 *c*

GAUTAMA.—(202) Gautama: Money due by a surety, a commercial demand, a toll, the price of spirituous liquors, a loss at play, and a fine, shall not involve the sons of the debtor.

VYASA.—203 Vyasa declares:—Neither a fine, nor a toll, nor the balance due for either, shall be necessarily paid by the son of the debtor; nor any debt for a cause repugnant to good morals.

YAJNYAWALKYA.—205 Yajnyawalkya: A son need not pay, in this world, money due by his father for spirituous liqors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll; nor anything idly promised.

NAREDA.—I. Dig. B. I. Ch. V (169) entered in (101)..... 242 *a*

Page.

NAREDA.—183. Nareda:—Any one surviving parcener may be compelled to pay another's share of a debt contracted by joint-tenants; but, if they be dead, the son of one is not liable to pay the debt of another.

CATYAYANA.—B. I. Ch. V. *v* 193 entered in 206 *a*..... 242 *a*
YAJNYAWALKYA.—I. Dig. B. I. Ch. V. *v.* 180. & entered in 241 *a*..... 242 *b*
NAREDA.—I. Dig. B. I. Ch. V. *v.* 181 entered in 241 *a*..... 242 *b*

VISHNU.—Vishnu:—He who takes the assets of a man leaving no male issue, must pay the sum due by him; and so must he who has the care of the widow left by one who had no assets..... 243 *a*

YAJNYAWALKYA. B. I Ch. V. *v.* 171 entered in 101..... 243 *a*
NAREDA.—B. I. Ch. V. *v.* 172 entered in 101..... 243 *a*
YAJNYAWALKYA.—I. Dig. B. I. Ch. V. *v.* 170. entered in 101..... 243 *c*
MENU.—IX. 142 entered in 65..... 243 *d*
CATYAYANA.—I. Dig. B. I. Ch. V. *v.* 173 entered in 101..... 244 *a*

CATYAYANA.—146. Catyayana:—A debt of the paternal grand-father, which is proved, or which is partly liquidated, must be discharged by the grand-son; but never shall a debt contracted for immoral uses, or which was contested by his father, be paid by the grand-son.

147. Catyayana:—Bhrigu ordains, that a debt devolving from the grand-father, which was proved, and acknowledged by the father, must be dischared by grand-sons, if it were not contracted for immoral uses, nor already paid by the sons.

2. The rule shall be the same in regard to the debts of the grand-father, which have not been discharged by other grand-sons, nor by his own sons: but a debt of the grand-father shall be paid by his grand-sons without interest..... 244 *b*

MITACSHARA.—Ch. I S. I 3 entered in 222 *a*..... 245 *a*
Do. „ 27 entered in 33 *a*.
Do. „ 30 entered in 220 *a*.
YAJNYAWALKYA.—I. Dig: B. I, Ch. 1. V. 171 entered in 101..... 245 *b*
NAREDA. „ .. 172 entered in 101.

MITACSHARA.—Therefore the right interpretation is this: when a man, who was separated from his co-heirs and not re-united with them, dies leaving no male issue, his widow (if chaste) takes the estate in the first instance. For partition had been premised; and re-union will be subsequently considered..... 245 *c*

YAJNYAWALKYA.—I Dig: B. I. Ch. V. V 180 entered in 241 *a*..... 245 *c*
NAREDA.—I Dig: B. II. Ch. IV S. I V. 6 entered in 209 (*b* & *c*)..... 247 *a*

NAREDA.—If a wife be thus addressed by her lord at the point of death, or just before a long journey, "such a debt must be paid by thee," she must pay it, however unwilling, if assets were left in her hands. 247 *b*

Page.

VRIHASPATI.—189 A housekeeper shall discharge a debt contracted by his uncle, brother, son, wife, servant, pupil, or dependants, for the support of the family during his absence..... 248 *a*

Do. The husband being a vintner, a hunter or fowler, a washer, a herdsman, a shepherd, or the like, shall pay the debt of his wife: it was contracted in the concerns of husband.

NAREDA.—191 Whatever debts has been contracted for the use of the family by a pupil, an apprentice, a slave, a wife, or an agent, must be paid by the head of the family, 209 entered in 9.

YAJNYAWALKYA.—I Dig: B. I. Ch. V. V. 207 entered in 9..... 248 *a*

YAJNYAWALKYA.—If the wife of a herdsman, a vintner, a dancer, a washerman, or a hunter, contract a debt, the husband shall pay it; because his livelihood chiefly depends on the labor of such a wife..... 216 *a*

VISHNU.—Neither shall a wife or mother be in general compelled to pay the debt of her husband or son, nor the husband or son to pay the debt of his wife or mother..... 248 *a*

CATYAYANA.—A debt which is contracted by a wife or mother for the behoof of the family, when her husband or son is gone to a foreign country, after authorizing the loan, must be paid by the husband or son..... 248 *b*

VYAVAHARA MAYUKHA.—Ch. V. S.IV 20 entered in 10..... 248 *b*

VISHNU.—I Dig; B. I. Ch. V. V 220 entered in 243 *a*..... 250 *a*

CATYAYANA.—The debts of men long absent in a foreign country, of idiots, madmen, and the like, who have no male kindred, and of religious anchorets, must be paid, even during their lives, but without interest, by such as have the care of the debtor's wife and goods..... 250 *a*

YAJNYAWALKYA.—I Dig: B. I Ch. V V. 207 entered in 9..... 250 *b*

VRIHASPATI.—A debt contracted by a son shall be paid by the father, if he promised payment; or he may pay it from affection to his son: but unless he promise, he cannot be compelled..... 250 *b*

CATYAYANA.—By the general rule of law, a father need not pay the debt of his son; but he must pay it, if, either at the time of the loan or afterwards, he promised payment..... 250 *b*

NAREDA.—A father must equally pay the debt of his son, contracted either by his own appointment, or for the support of his family, or in a time of distress..... 250 *b*

MITACSHARA.—Effects, which had been divided and which are again mixed together, are termed re-united. He to whom such appertain, is a re-united parcener..... 250 *c*

Page.

MITACSHARA.—The share or allotment of such a re-united parcener deceased, must be delivered by the surviving re-united parcener, to a son subsequently born, in the case where the widow's pregnancy was unknown at the time of distribution. Or, on failure of male issue, he, and not the widow, nor any other heirs, shall take the inheritance..... 250 *d*

APPENDIX TO DIVISION.

NAREDA.—When the mother is too aged to bear more sons, and all the sisters have been given away in marriage, and the father either refrains from pleasures, or withdraws from wordly concerns, then shall partition be made..... 267 *a*

DAYABHAGA.—Ch. I. 31 entered in 214 *d*..... 267 *a*

32. Accordingly. Nareda says: "When the mother is past child-bearing, and the sisters are married, or if the father be lost, or no longer an house-holder, or if his temporal affections are extinct.

33. "Lost" signifies degraded: "no longer a house-holder," having quitted the order of a house-hold:—If the reading be "When he is exempt from death," then the sense is "When being exempt from death (that is alive,) he is devoid of affections." The variation in the reading is unfounded.

MITACSHARA.—One period of partition is when the father desires separation, as expressed in the text. "When the father makes a partition". (§ 1). Another period is while the father lives, but is indifferent to wealth and disinclined to pleasure, and the mother is incapable of bearing more sons; at which time a partition is admissible, at the option of sons, against the father's wish: as is shown by Nareda; who premises partition subsequent to the demise of both parents. ("Let sons regularly divide the wealth when the father is dead"); and adds "Or when the mother is past child-bearing and the sisters are married, or when the father's sensual passions are extinguished". Here the words "let sons regularly divide the wealth" is understood. Gautama likewise, having said "After the demise of the father, let sons share his estates; States a second period, "Or when the mother is past child-bearing;" and a third, "while the father lives, if he desire separation." so, while the mother is capable of bearing more issue, a partition is admissible by the choice of the sons, though the father be unwilling, if he be addicted to vice or afflicted with a lasting disease. That Cankha declares: "Partition of inheritance takes place without the father's wish, if he be old, distrbed in intellect, or diseased."..... 267 *a*

SMRITI CHANDRIKA.—The same author adds that, in some ins partition may be made by the sons alone even where the father

Page.

under no defect:—"Let sons equally divide the wealth when the father is dead, or when the mother is past child-bearing, and the sisters are married and when the father's sensual passions are extinguished and his affection (spriha) or desire for worldly concerns have ceased."..... 267 *a*

MADHAVYA.—Prajapati says that division is to be made for the purpose of increase of dharma after the father's death;—"So they may live together, or separately out of regard for Dharma. If they are separate Dharma increases, therefore separation is right." Brihaspati says : "The worship of pitr's, devas, and Brahmans, is single in the case of those who live by one dressing of food, (*i. e.* together) but in the case of divided members of a family it occurs in each separate house..... 267 *a*

DAYAKRAMA SANGRAHA.—Hence in a partition made by a father of his own acquired wealth, he may take as much of it as he pleases, and divide the remainder among his sons according to the text of Vishnu already quoted, and the following text of Harita : "*A father, during his life, distributing his property, may retire to the forest, or enter into the order suitable to an aged man* ; or he may remain at home having distributed small allotments, and keeping a greater portion. Should he become indigent, he may take back from them."..... 267 *a*

DAYABHAGA.—Ch. I. 30 entered in 233 *a* & *b*..... 267 *b*

" " 31 entered in 214 *d*.

" " 32 and 33 vide *a*.

But, if this be pronounced to be another period of partition, then four distinct periods would arise : 1. the demise of the father ; 2. his degradation ; 3. his disregard of secular objects : 4. his own choice.

SANCHA AND LECHITA.—Of him who has been formally degraded, the right of inheritance, the funeral cake, and the libation of water are extinct..... 267 *b*

NAREDA.—The father being degraded, or become an anchoret, or having resigned, or deceasing naturally, his sons may divide his estate..... 267 *b*

DAYABHAGA.—Ch. II.

15. Or the meaning of the text may be, as set forth by Dhàrèc vara, 'A father, occupied in giving allotments at his pleasure, has equal ownership with his sons in the paternal grand-father's estate. He is not privileged to make an unequal distribution of it, at his choice, as he is in regard to his own acquired wealth.

16. So Vishnu says "When a father separates his sons from himself, his will regulates, the division of his own acquired wealth. But, in the estate inherited from the grand-father, the ownership of father and son is equal."

Page.

17. This is very clear. When the father separates his sons from himself, he may, by his own choice, give them greater or less allotments, if the wealth were acquired by himself: but not so, if it were property inherited from the grand-father; because they have an equal right to it. The father has not in such case an unlimited discretion..... 268

MITACSHARA.—Ch. 1. S. II.

2. When a father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two or more sons.

3. No rule being suggested (for the will is unrestrained,) the author adds, by way of restriction, "he may separate (for this term is again understood) the eldest with the best share," the middlemost with a middle share, and the youngest with the worst share.

4. This distribution of best and other portions is propounded by Menu. The portion deducted from the eldest is the twentieth part of the heritage, with the best of all the chattles; for the middlemost, half of that; for the youngest, a quarter of it."

5. The term "either" (§ 1) is relative to the subsequent alternative "or all may be equal sharers." That is, all, namely the eldest and the rest, should be made partakers of equal portions.

6. This unequal distribution supposes property by himself acquired. But, if the wealth descended to him from his father, an unequal partition at his pleasure is not proper: for equal ownership will be declared..... 268 *a*

DAYAKRAMA SANGRAHA.—Ch. VI.

2. Thus Vishnu declares: "When a father separates his sons from himself, his will regulates the division of his own acquired wealth."

7. The fact then is, that this text of Vishnu: "Where a father separates his sons from himself, his will regulates the division of his own acquired wealth," is useful, as showing, that the father's will is absolute in regard to the division of his wealth, and accordingly, that the text of Gautama which exhibits the concomitancy of the cessation of the mother's courses with the will of the father, is strictly applicable to ancestral property. This is correct.

Entered in 267-8 *a*.

12. Nareda says: "For such as have been separated by their father with equal, greater or less allotments of wealth, that is a lawful distribution: for the father is lord of all."

13. "Lord:" That is, possessed of the power to alienate at pleasure: consequently, this text relates to property acquired by a father

Page.

himself, by reason of the impossibility of the existence of such a power as above described, in regard to ancestral wealth..... 268 *a*

MADHAVYA.—entered in 267 *a*..... 268 *a*

NAREDA.—Or even the father, being advanced in years, may himself divide the estate among his sons, giving to the first born the best portion, or in any mode which he shall choose..... 268 *a*

VISHNU.—If a father make a partition between himself and his sons, he may give or reserve, at his pleasure, any part of his own acquired wealth; but over landed property left by a paternal grand-father, the father and the sons have equal dominion..... 268 *a*

YAJNYAWALKYA.—If the father make a partition among his sons, he may give, at his pleasure, more to some and less to others, or give the first-born the portion of an eldest son, or divide the estate among all of them in equal shares..... 268 *a*

MENU.—If among undivided brethren living with their father, there be a common exertion for common gain, the father shall never make an unequal division among them, when they divide their families.... 268 *a*

CATYAYANA.—If a father, during his life, divide the property, he shall not prefer one of his sons, nor exclude one of them from a share, without a sufficient cause..... 268 *b*

NAREDA.—A father has no power, if his intellect be disturbed by sickness, or his mind agitated by wrath, or his affection partially set on the son of a favourite wife, to make a partition different from the law of inheritance,..... 268 *b*

DAYABHAGA.—Ch. II.

74. Among his sons, he may make the distribution, either by giving (to the first born) or with-holding (from him) the deduction of a twentieth part of the grand-father's estate. But, if he make an unequal distribution of his own acquired wealth, being desirous of giving more to one, as a token of esteem, on account of his good qualities, or for his support on account of a numerous family, or through compassion by reason of his incapacity, or through favor by reason of his piety; the father, so doing, acts lawfully.

83. But the text of Nareda, which expresses, that "A father, who is afflicted with disease, or influenced by wrath, or whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distribution of the estate;" relates to the case where the father, through perturbation of mind occasioned by disease or the like, or through irritation against any one of his sons, or through partiality for the child of a favorite wife, makes a distribution not conformable to law. Nevertheless, unequal partition

Page.

is lawful, when grounded on (either of the four) reasons above mentioned.

84. Thus Katyayana says : " But let not a father distinguish one son at a partition made in his life-time, nor on any account exclude one from participation without sufficient cause."

85. Let him not distinguish one by the allotment of a greater portion, nor exclude one from participation by depriving him of his share, without sufficient excuse. (This does not relate to specific deductions :) for the distinguishing of sons by alloting to them the prescribed deductions (of a twentieth, and half or a quarter of a twentieth,) extends to many (viz. eldest, middlemost and youngest ;) and is not confined to one. One son should not be distinguished without cause. But, for a sufficient reason, it may be done. Since the meaning is "even one son". The distinguishing of one, (as here forbidden,) has no reference to specific deduction ; but intends a distribution made according to the father's mere pleasure, as before explained..... 268 *b*

MITACSHARA.—When the distribution of more or less among sons separated by an unequal partition is legal, or such as ordained by the law ; then that division, made by the father, is completely made, and cannot be afterwards set aside : as is declared by Menu and the rest. Else it fails, though made by the father. Such as the meaning ; and in like manner, Nareda declares : " A father, who is afflicted with disease, or influenced by wrath, or whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distribution of the estate..... 268 *b*

DAYAKRAMA SANGRAHA.—Ch. VI.

11. If a father should give to any one of his sons a greater share, by reason of his good qualities, or of his piety, or of his having a numerous family, or of his incapacity, such a distribution is authorized by law.

14. A father, must not however, while afflicted by sickness or disorder, or laboring under distraction of mind, or inflamed with anger, or influenced by partiality for the son of a favorite wife, distribute a less or greater share to one of his sons, without the existence of any of the causes above mentioned ; for the text of Nareda declares, " A father who is afflicted with disease, or influenced by wrath, or whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distribution of the estate..... 268 *b*

SMRITI CHANDRICA.—It is hence settled that unequal distribution made by the father even of his self-acquired property, according to his

Page.

whims, without regard to the restrictions contained in the Sastras is not maintainable, where sons are dissatisfied with such distribution.

YAJNYAWALKYA.—II. Dig. B. V. Ch. VI 268 *d*

V. 385 entered in 182 *a*

DAYABHAGA.—Ch. XIV.

1. The determination of a doubt, regarding the fact of a partition having been made is next explained. On that subject Nareda says, "If a question arise among co-heirs in regard to the question of partition, it must be ascertained by the evidence of kinsman, by the record of the distribution, or by the separate transaction of affairs."

2. The mention of kinsmen is intended to show, that, if such be forthcoming, other persons should not be made witnesses. Accordingly (since a recourse to other witnesses is forbidden when kinsmen are forthcoming,) Yajnyawalkya says, "When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives and witnesses, and by written proof; or by separate possession of house or field."

DAYABHAGA.—Ch. I

8. The answer is: partition consists in manifesting (or in particularizing) by the casting of lots or otherwise, a property which had arisen in lands or chattles, but which extended only to a portion of them, and which was previously unascertained, being unfit for exclusive appropriation, because no evidence of any ground of discrimination existed.

9. Or partition is a special ascertainment of property, or making of it known (by reference of a particular share to a particular person.)

MITACSHARA.—Ch. II. S. XII. 268 *d*

1. Having thus explained partition of heritage, the author next propounds the evidence by which it may be proved in a case of doubt: "When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives and witnesses, and by written proof, or by separate possession of house or field."

2. If partition be denied or disputed, the fact may be known and certainly be obtained by the testimony of Kinsmen, relatives of the father or of mother, such as maternal uncles and the rest, being competent witnesses as before described; or by the evidence of a writing, or record of the partition. It may also be ascertained by separate or unmixed house and field.

MITACSHARA.—Ch. I. S. I. 4 entered in 185 *a*

SMRITI CHANDRIKA.—Ch. XVI. 268 *d*

1. Yajnyawalkya:—"When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives and witnesses,

and written proof, or by separate possession (yautukyh) of house or field."

3 entered in 182 *a*

11. Hence a lender is necessarily concluded to be divided with the borrower. Accordingly, Brihaspati :—"They who have their income, expenditure and wealth distinct and have mutual transactions of money-lending (Kusseetham) and traffic are undoubtedly separate."

MADHAVYA.—Nareda relates what the divided (parceners) can do :—"If there are many sons of one man who perform their duties and rites separately and who have different employments and qualities, if they do not concur in acts and if they give or sell by themselves, they may do as they like, for they are masters of their own property." C. If several divided brothers (being) sons of one person, without mutual consent perform sacrifices and acts of piety which are carried out by means of wealth, and also performed agricultural operations which are accomplished by expenditure of wealth, and if also they are possessed of separate property, such as mortars, pestles, and if such brothers do not concur in the acts, and if they do any act without regard to them (*i. e.*, the others), if such brothers separated by nature give, sell, or receive, they may do so at their will ; for they who are separated, are masters of their wealth, are independent, (*i. e.*,) lords of it, such is the meaning. As for the text of Brihaspati, "divided and undivided co-heirs are equal in regard to immoveable property, one by himself has no power over the whole, either to give, pledge, or sell," this must be explained (as follows) : in the case of co-heirs who are not divided, because no one by himself has power over the common property, the consent of all must necessarily be obtained ; but among divided co-heirs, the consent of all should be obtained in order to facilitate the transaction, by prevention of doubts in after time, as to who were divided and undivided ; not because one alone has no power : hence even without the consent of a divided (co-heir) the transaction holds good.

As for what is said in another Smiriti, "By consent of people of one's village, of kinsmen, neighbours, and heirs, and by the gift of gold and of water, land goes to another owner," the meaning is as follows : "Consent of people of one's village," this is introduced for the purpose of making the transaction known, for by the Smriti, "let there be publicity of acceptance, especially in the case of immoveable property," the transaction is not effected without consent of people of the town. "Consent of the neighbours," in order to prevent doubts about the boundaries, &c.

The "consent of kinsmen and heirs," in order to facilitate the transaction by removal of doubts as to who are divided and who are

Page.

not. "By gift of gold and water;" this is to be done on occasion of a sale of land. The meaning is, that one should by giving gold and water, effect the sale of immoveable property in the form of a gift; because the sale of land is forbidden by the text. "There is not sale of immoveable property, one should pledge it by permission," also because the acceptance and gift of land are both landable: "He who receives and he who gives away land, both do virtuous acts, and both certainly go to heaven."

MITACSHARA.—Ch. I. S. I. 4 entered in 185 *a*..... 270 *a*

SUBHODONI AND BALAMBATTA.—entered in 189 *a*..... 270 *a*

DAYABHAGA.—Ch. I. 8 and 9 entered in 268 *d*..... 270 *a*

MITACSHARA.—Ch. II. S. XII. 1 and 2 entered in 268 *d*..... 270 *b*

YAJNYAWALKYA.—II. Dig. B. V. Ch. VI. V. 385 entered in 182 *a*..... 270 *b*

VYAVAHARA MAYUKHA.—Ch. IV. S. III..... 270 *b*

1. This Nareda declares: "Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation, called by the wise, partition of heritage." The word sons includes (by synecdoche) grand-sons, and the rest. And in the same way, by paternal (is intended the estate of) the grand-father and the rest. But Madana has the very words, 'of a father and the rest.' And this definition, of 'partition of heritage,' has been declared.

2. Even when there is a total failure of common property, a partition may also then be made, by the mere declaration, 'I am separate from thee.' A partition may even be a mere mental distinction. This exposition clearly distinguishes the various qualities of this (term).

SMRITI CHANDRIKA.—Ch. XVI.X. 1 entered in 268 *d*..... 270 *b*

Do. „ 3 entered in 182 *a*.

MADHAVYA.—55 entered in 268 *d*..... 270 *b*

VYAVAHARA MAYUKHA.—Ch. IV. S. III. 2 entered in 27 *o b*..... 275 *a*

DAYABHAGA.—Ch. I. 8 entered in 268 *d*.....275 *b* & *c*

MITACSHARA.—Ch. I. S. I. 4 entered in 185 *a*.....275 *b* & *c*

NAREDA—.I. Dig. B. II. Ch. IV. S. I. V. 6 entered in 209. *b* & *c*.....275 *b* & *c*

DAYABHAGA—.Ch. I..... 275 *d*

2. First, the term partition of heritage (Dayabhaga) is expounded; and, on that subject, Nareda says, "Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation, called by the wise partition of heritage."

3. Entered in 268 *d*.

Page.

MITACSHARA.—Ch. I. S. I. 4 entered in 185 *a*..... 275 *d*

5. Entertaining the same opinion, Nareda says, "Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation called by the wise partition of heritage." "Paternal" here implies any relation, which is a cause of property. "By sons" indicates propinquity in general.

MENU.—Once is the partition of an inheritance made; once is a damsel given in marriage; and once does a man say "I give:" these three are, by good men, done once for all and irrevocably..... 275 *e*

MITACSHARA.—Ch. II. S. XII. 2 entered in 268 *d*..... 275 *e*

DAYABHAGA.—Ch. XIII..... 275 *e*

5. But the maxim, "once is the partition of inheritance made," relates to the case of a fair distribution.

DAYABHAGA.—Ch. XIV. 1 and 2 entered in 268 *d*..... 275 *e*

Do. Ch. I. 8 & 9 entered in 268 *d*..... 276 *a*

Do. Ch. XIV. 1 & 2. entered in 275 *e*..... 276 *a*

MITACSHARA—.Ch. I. S. I. 4 entered in 185 *a*..... 276 *a*

Do. Ch. II. S. XII. 1 & 2. entered in 268 *d*.

DAYABHAGA.—Ch. XIV. 1 & 2. entered in 269 *d*..... 276 *b* & *c*

SMRITI CHANDRIKA.—Yautakyh, Possessing separately. The expression "When partition is denied" used in the text includes also the collateral questions arising out of the fact of a partition. Hence, Nareda: "If a question arise among co-heirs in regard to the fact of partition, it must be ascertained, by the evidence of kinsmen and by the record of the distribution, or by the separate transaction of the affairs." 276 *b* & *c*

DAYABHAGA.—Ch. XIV. 1 & 2. entered in 268 *d*..... 276 *d*

Do. „ 6 entered in 175 *a*.

VYAVAHARA MAYUKA.—"In non-fulfilment of a gift, as well as in gift, and in cases where a decision is required between a master and his servant; in non-fulfilment of sale, and refusal to receive goods purchased; in gambling also, whether with animate or living objects, when disputes are brought up, proof by witnesses is declared requisite, not by ordeal nor by documents."..... 276 *e*

VYAVAHARA MAYUKA.—Ch. IV. S. VII. 27 entered in 187 *h*.

28. The same author says: "The religious duty of unseparated brethren is single. When partition has indeed been made, religious duties become separate for each of them." Here the term unseparated, is intended even to denote condition, whilst the substantive, brethren, is (merely) a general term, of which the condition is so denoted. By this (reasoning,) in every unseparated family, of whomsoever it may consist, father, grand-father; son, son's son; paternal

Page.

uncle, brother, brother's son, or other (member),the religious duty is even single.

DAYABHAGA.—Ch. XIV. 1-2 entered in 268*d*..... 276 *f*
Do. „ 6 entered in 175 *a*

SMRITI CHANDRIKA.—Ch. XVI..... 276 *f*
Do. 1 entered in 268 *d*.
Do. 3 entered in 182 *a*.

VYAVAHARA MAYUKA.—Ch. IV. S. VII..... 277 *a*
27 entered in 187 *h*.
28 entered in 276 *f*.

DAYABHAGA.—Ch. XIV. 8 entered in 182 *a*.
Do. do. 9 entered in 182 *a*
Do. do. 10 entered in 178 *a*.
Do. do. 11 entered in 175 *a*.

MITACSHARA.—Ch. II. S. XII 3 and 4..... 277 *a*
entered in 182 *a*.

SMRITI CHANDRIKA.—Ch. XVI..... 277 *a*

12. The same author further declares that division must be inferred from these circumstances, only in default of proof directly establishing the fact. "A violent crime, right to immoveable property, and a previous partition among co-heirs; may be ascertained by presumptive proof, if there be no witnesses."

A previous partition] A partition that took place before the time of dispute regarding it.

Presumptive proof,] Proof arising from circumstances.

14. Katyayana on the subject :—"Partition of patrimony shall be presumed where brethren have lived ten years apart, separated in their religious rites and civil observances."

The term "brethren" is here used to denote co-parceners in general and the term "patrimony" to denote heritage of any kind.

15. The meaning of the above text is that although a partition of heritage may not actually have taken place, yet in the instances referred to, the parties will be presumed to be divided according to the passage; "He who sees his land possessed by a stranger for twenty years or his personal estate for ten years, without asserting his own right, looses his property in them."

DAYABHAGA.—Ch. III. S. I. 16 entered in 173 *a*..... 277 *b*

17. Accordingly (since partition by the choice of one co-heir is lawful;) Katyayâna, treating of partition, says: "Let them deposit,

Page.

free from disbursement, in the hands of Kinsmen and friends, the wealth of such as have not attained majority; as well as of those who are absent." So a text expresses, "The property of minors should be so preserved until they attain their full age."

MITACSHARA.—But, if she were evidently pregnant, the distribution should be made, after awaiting her delivery; as Vasishta directs, "Partition of heritage (takes place) among brothers (having waited) until the delivery of such of the women, as are childless (but pregnant)." This text should be interpreted, having waited until the delivery of the women who are pregnant."..... 277 *b*

MITACSHARA.—Ch. I. S. I. 5 entered in 275 *d*..... 277 *c*

VYAVAHARA MAYUKA.—Ch. IV. S III 1 and 2 entered in 270 *b*..... 277 *c*

DAYABHAGA.—What came from the father is "paternal:" and this signifies property arising from the father's demise. The expressions "paternal" and "by sons" both indicate any relation: for the term "partition of heritage" is used for a division of the goods of any relation by any relatives. Accordingly Nareda, having premised "partition of heritage" as a topic of litigation, shows under that head of actions, the distribution of effects left by the mother and the rest. So Menu likewise, premising inheritance, but without employing the word father or any other specific term, propounds the division of effects of any relative..... 277 *c*

MENU.—'Should the king be near his end through some incurable disease, he must bestow on the priests all his riches accumulated from legal fines; and, having duly committed his Kingdom to his son, let him seek death in battle, or, if there be no war, by abstaining from food'.. 278 *a*

CATYAYANA.—II. Dig. B. V. Ch. V. S. II. V. 365 entered in 184 *c*..... 278 *a*
MENU.—Ch. IX. 323 entered in 278 *a*..... 279 *a*
CATYAYANA.—II. Dig. B. V. Ch. V. S. II. V. 365 entered in 184 *c*..... 279 *a*

Do. ..... 279 *c*

VYASA.—Vyasa:—A place of abode, vehicles, prepared grain, water, and women shall not be divided; nor a place of sacrifice, nor an idol, even though it had been transmitted from father to son for a thousand generations..... 279 *b*

DAYABHAGA.—Ch. VI. S. II..... 279 *b*

25. So Vyasa: "A place of sacrifice,] a field, a vehicle, dressed food, water and women, are not divisible among kinsmen, though (transmitted) for a thousand generations.

26. A place of sacrifice.] The spot, where sacrifices are performed; or else an idol: not wealth obtained by sacrificing; for that has been noticed as being the earning of science.

Page.
VYAVAHARA MAYUKA.—Ch. IV. S. VII..... 279 b
Do. ..... 279 c

20. According to the Kalpataru: By the term sacrifices and pious acts, (Yoga-kshema) holy councillors, family priests, and the like are denoted.' But Langakshi says: "The learned have named a conservatory act, khema; and a Sacrificial one, yoga: both are pronounced indivisible: and so are the bed and the chair;" In this place a conservatory act, means (construction of) tanks, gardens, and the like. The meaning is this: Whatever property is, with consent of all whilst in a state of unity, set apart for this purpose, and kept by one individual, with that very property that act of religion shall be executed, by that same individual, and by no other: Neither shall all join for the purpose. The common way, the way to the house or the like, also land for cattle pasture, and the like.

21. As for this text of Cankha and Likhita: "No division of a dwelling takes place; nor of water pots, ornaments, and things not of general use:" and this of Vyasa: "A place of sacrifice, a field, a vehicle, dressed food, water, and women, are not divisible among kinsmen, though transmitted for a thousand generations," whereby they declare the impartible nature, both of a dwelling and a field, they have reference to a religious foundation, and land for cattle pasture, and the like; (or else) to the prohibition of the partition, by the kshatrya or other (son of Brahman by woman of the other tribes,) of these two things, obtained (by the Brahman) by acceptance of donation; because it has been already noticed as forbidden. Or (thirdly), it may refer to a partition of even these two things, when of little price, at a valuation, and not by actual division of them.

23. Katyayana: "Wealth which has been fixedly assigned for the purpose of religion, and entered in a deed; and likewise water; slaves also, and such fixed property (or a corody, nibandha) as has gone in order of descent; clothes that have been worn, and ornaments, do not resemble (divisible effects). According to the time they have been enjoyed, even so let them be made use of (in turns) by the brothers." Wealth, means such as has been set apart as the share (to be expended for) religion, and so entered in a deed. Water, contained in wells or the like. Fixed property, a means of livelihood (vritti.) Do not resemble, that is, are) unfit for partition.

DAYAKRAMA SANGRAHA.—"A place of sacrifice:" That is, where sacrifices are made, or the image of a god is placed; but not wealth obtained by sacrificing, since that has already been included in the gains of Science. Thus Katyayana: "The path for cows, the carriage road, clothes, and anything which is worn on the body, should not be divided, nor what is requisite for use, nor intended for arts." So Vrihaspati declares..... 279 b

Page.

YAJNYAWALKYA.—II. Dig. B. V. Ch. V. S. II..... 280 *a*
V. 362 entered in 183 *a*

VYASA.—II. Dig. B. V. Ch. V. S. II..... 280 *a*
V. 354 entered in 183 *a*

DAYABHAGA.—Ch. VI S. I..... 280 *a*
1, 2, 4, 6 & 7 entered in 183 *j*
3 & 5 entered in 174 *c*

MITACSHARA—Ch. I. S. IV. 1 entered in 174 *c*
Do. „ 2 entered in 183 *j*

VYAVAHARA MAYUKA.—Ch. IV. S. VII..... 289 *a*
2 entered in 183 *i*

DAYAKRAMA SANGRAHA.—What has been acquired by a separated or an unseparated parcener without the expenditure of the joint-property, and without the assistance of another, belongs exclusively to the acquirer, and is indivisible with the rest..... 280 *a*

SMRITI CHANDRIKA.—Ch. VII..... 280 *a*

27. The principle contained in Yajnyawalkya's test, *i. e.* "Whatever else is required by the co-parcener himself without detriment to the father's estate." (para 25) is explained by Menu in his passage "What has been acquired by labour without prejudice to the father's estate."

28. In both the above psssages, the word "father" signifies of an undivided co-heir generally. "By labour" means by acts requiring labour, such as agriculture &c. "Without prejudice" means without detriment.

29. Vyasa, too, "Whatever a man gains by his own labour without the assistance of the father's estate shall not be given by him to the co-heirs."

MADHAVYA. 53.—Yajnyawalkya describes non-partible property: What else is self-acquired without injury to the paternal property, a friendly gift, or present on a marriage, does not belong to the co-heirs. He who recovers it need not give up to the co-heirs property descended in due course, if it has been taken away; nor what is gained by learning." C. "What is self-acquired;" (i. e.) by agriculture,&c., without causing loss to the paternal property, and what has been received from a friend in a marriage, that also does not belong to the brothers &c., of the acquirer..... 280 *a*

CATYAYANA.—II. Dig. B. V. Ch. V. S. II..... 280 *d*
347 entered in 231 *b*

Page.

MENU—II. Dig. B. V. Ch. V. S. II..... 280 *d*
V. 342 entered in 231 *b*

NAREDA—II. Dig. B. V. Ch. V. S. II. V. 353 entered in 231 *b*,..... 280 *d*

NAREDA.—If one parcener, be he ever so ignorant, shall maintain the family of a brother studying science, he shall state the wealth which that brother may gain by his learning..... 357

VYASA—II. Dig B. V. Ch. V. S. II. V. 354 entered in 183 *i*..... 280 *d*
DAYABHAGA—Ch. VI. S. I. 21 entered in 27 *b*..... 280 *d*

MITACSHARA—Ch. I. S. IV. 7 entered in 226 *b*..... 280 *b*
Do. „ „ 8 entered 174 *c*.

VYAVAHARA MAYUKA—Ch.IV. S. VII. 1 & 2 entered in 183 *i*..... 280 *d*

SMRITI CHANDRIKA—Ch. VII.

1. Vyasa.—"Wealth gained by science, or earned by valor or received from affectionate kindred belongs at the time of partition to him (who acquired it) and shall not be claimed by the co-heirs."..... 280 *d*

2 By the words "gained by science", it is not to be understood that wealth gained by learning generally is impartible, but the learning should have been acquired in the peculiar mode described by Katyayana in the passage, "Wealth gained through science, which was acquired from a stranger while receiving a foreign maintenance, is termed 'Acquisition through learning."

6. Nareda, too, defines what is partible wealth gained by learning. "If one parcener, be he ever so ignorant, shall maintain the family of a brother studying science, he shall share the wealth which that brother may gain by his learning." This text is intended to show that wealth gained by science acquired with the use of joint funds is divisible. Be he ever so ignorant; Although he be unlearned.

MADHAVYA.—Katyayana has defined non-partible property acquired by learning: "If learning has been acquired by the use of the property of another, or elsewhere, wealth acquired by such means is called (wealth) gained by learning. What is gained by learning (as a prize) in a contest for a stake, one should know to be wealth gained by learning, and it should not be divided. What is acquired from a pupil, or by the priestly office, by answering a question, by deciding a difficult question, by display of one's knowledge, by a contest in learning or by reading the vedas, the learned have pronounced to be wealth acquired by learning, and it is not to be divided. What is gained by learning, by having vanquished another for a wager, Brihaspati has declared to be wealth acquired by learning and not to be divided. This same rule applies to artizans, and what is gained above the ordinary price. What is gained by force of learning, from a person who has a sacrifice performed, or a pupil,

Page.

they have pronounced to be 'wealth acquired] by learning;" what is acquired otherwise is common." So what besides 'wealth acquired by knowledge,' and what is acquired by the use of the property of an undivided father, &c., that is common, or the joint property of the undivided co-parceners. Nareda says that in some cases even wealth acquired by learning is to be divided :—

"A member of a family though he be ignorant, who supports his brother while learning science, shall get a share of the wealth acquired by that brother by learning."

MENU.—What is received with a damsel equal in class, at the time of accepting her in marriage, let a man consider as wealth received with the maiden : it is deemed pure, and promotes increase of prosperity :

2. But let him know that to be received on account of marriage, which is accepted by him with his bride : all such wealth is considered as vindicating the solemn rite..... 282 *a*

DAYABHAGA :—Thus Yajnyawalkya says : "Whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he, who recovers hereditary property, which had been taken away, give it up to the co-parceners : nor what has been gained by science." So Nareda : "Excepting what is gained by valour, the wealth of a wife, and what is acquired by science, which are three sorts of property exempt from partition ; and any favor conferred by a father," Likewise Vyasa : "Wealth gained by science, or earned by valour, or received from affectionate kindred, belongs, at the time of partition, to him (who acquired it,) and shall not be claimed by the co-heirs."..... 282 *a*

MITACSHARA—Ch. I. S. IV. 6 entered in 174 *c*..... 282 *a*

VYAVAHARA MAYUKA—Ch. IV. S. VII. 33 entered in 178 *a*..... 282 *a*

SMRITI CHANDRIKA—Ch. VII..... 282 *a*

21. Katyayana defines wealth received with a maiden and wealth received on account of marriage. "What is received when a damsel equal in class given in gift (before marriage), let a man consider as wealth received with the maiden : it is deemed pure and promotes increase of prosperity. But let him know that what he receives with his bride is wealth received on account of marriage : all such wealth is considered as vindicating the solemn rite."

Received with the maiden] Received together with the damsel.

22. As for Stridhana, the same author states that all kinds of Stridhana are impartible. "Whatever is presented at the time of nuptials to the bridegroom, belongs entirely to the bride and

Page.

shall not be shared by the kinsmen. The gains of valour and of science as also what is considered Stridhana; these are also not liable to partition by the co-heirs at the time of division."..... 282 *a*

CATYAYANA.—On a partition by co-heirs, all the wealth left by their father, or by his father, and what they themselves have acquired by their joint efforts, shall be divided among them..... 287 *a*

MENU.—IX. 208 entered in 174 *c*..... 287 *a*
CATYAYANA.—II. Dig. B. V. Ch. VI. V. 368 entered in 287 *a*..... 290 *a*
DAYABHAGA.—Ch. VI. S. I. 1, 2 & 4 entered in 183 *j*..... 290 *a*
Do. Do. 3 entered in 174 *c*

MENU.—II. Dig. B. V. Ch. V. S. II. V. 348 entered in 231 *b*..... 291 *a b & c*
YAJNYAWALKYA.—II. Dig. B. V. Ch. V. S. II. V. 352 entered in 183 *i*. 291 *a b & c*
VYASA.—II. Dig. B. V. Ch. V. S. II. V. 354 entered in 183 *i*..... 291 *a b & c*
DAYABHAGA.—Ch. VI. 1, 2, & 4 entered in 183 *j*..... 291 *a b & c*
Do. Do. 3 entered in 174 *c*

MITACSHARA.—Ch. I. S. IV. 1 entered in 174 *c*..... 291 *a b & c*
Do. Do. 2 entered in 183 *j*

VYAVAHARA MAYUKA.—Ch. IV. S. VII. 2 entered in 183 *i*..... 291 *a b & c*
SMRITI CHANDRIKA.—Ch. VII. 27, 28, & 29 entered in 280 *a*..... 291 *a b & c*

30. "Without the assistance" means without deriving assistance for the purpose of gaining. The word "father" is used to denote an undivided co-heir generally.

MADHAVYA.—47 entered in 280 *d*..... 291 *a b & c*

DAYABHAGA.—It is therefore, demonstrated, that wealth, acquired by means of joint-stock used for the express purpose of gain, is common property; and no other is so..... 291 *d*

MITACSHARA.—Ch. I. S. IV. 30 & 31 entered in 226 *a*..... 292 *a*
MITACSHARA.—Ch. I. S. I. 5 entered in 275 *d*..... 292 *b*

6. The points to be explained under this (head of inheritance), are at what time, how, and by whom a partition is to be made, of what. The time, the manner, and the persons, when, in which, and by whom, it may be made, will be explained in the course of interpreting stanzas on those subjects respectively. What that is, of which a partition takes place, is here considered:

MITACSHARA.—Ch. I. S. V. 1.

The distribution of the paternal estate among sons has been shown; the author next propounds a special rule concerning the division of the grand-father's effects by grand-sons. "Among grand-sons by different fathers, the allotment of shares is according to the fathers."

Page.

DAYABHAGA.—Ch. I.

2. First, the term partition of heritage (dâya-bhâga) is expounded; and, on that subject, Nareda says, "Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation, called by the wise, Partition of heritage."

3 entered in 277 *c*.
9 entered in 268 *d*.

35. Since any one parcener is proprietor of his own wealth, partition at the choice even of a single person is thence deducible; and concurrence of heirs, suggested as one case of partition, is recited explanatorily in the text, "the brethren being assembled &c." Else, since assemblage implies many, there could be no distribution between two; for no passage of law expressly propounds a division between two co-heirs..... 292 *b*

DAYABHAGA.—Ch. III. S. I. 16 entered 173.(*a*.)

MITACSHARA.—Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grand-father's estate does nevertheless take place by the will of the son.....294 *a* & 294 *b*

MADHAVYA.—12 entered in 237 *b*..... 294 *b*
DAYABHAGA.—Ch. II. 294 *c*

7. Therefore the death of both parents is one period for partition of an estate inherited from a grand-father or other ancestor, and the other is by the choice of the father when the mother is past child-bearing.

8. A division of it does not take place without the father's choice; since Menu, Nareda, Gautama, Baudhayana, Cankha and Likhita, and others, (in the following passages, "they have not power over it" "they have not ownership while their father is alive and free from defect," "while he lives, if he desire partition," "partition of heritage by consent of the father," "partition of the estate being authorized while the father is living,"&c.) declare without restriction that sons have not a right to any part of the estate, while the father is living, and that partition awaits his choice; for these texts, declaratory of a want of power, and requiring the father's consent, must relate also to property ancestral; since the same authors have not separately propounded a distinct period for the division of an estate inherited from an ancestor..... 294 *c*

DAYACRAMA SANGRAHA.—Ch. VI. 294 *c*

1. A partition made by a father of his own acquired wealth, is regulated by his will alone; but in regard to a division of the

Page.

ancestral property, the circumstance of the cessation of the mother's courses must be associated with the father's will. This is the difference.

3. But in regard to ancestral property, Gautama says: "After the (demise of the) father, let sons share his estate, or while he lives, if the mother be past-child bearing, and he desire partition."

4. It should not be argued that this text of Gautama is also applicable to a father's own acquired property; for if it be alleged that partition of the father's acquired wealth takes place indeed on the cessation of the mother's courses, it would follow that the text (of Gautama) which declares: "A son begotten after partition takes exclusively the wealth of his father," would be wholly irrelevant: since no son can be born on the extinction of the mother's courses.

5. It must not be asserted, that this last cited text of Gautama relates to ancestral property, and is consequently not irrelevant, for supposing such to be the case, a son born after partition, would be debarred from participation in the ancestral property, and consequently deprived of subsistence: which is forbidden by the text, declaring "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support and the dissipation of their hereditary maintenance is censured."

6. Nor should it be said that the son begotten after partition would not be deprived of subsistence, since he would be entitled after his father's death to that share of the ancestral property, which had been taken by him, for supposing the father to have dissipated the whole of such property, the son would inevitably be deprived of subsistence.

7 entered in 268 *a*

VYAVAHARA MAYUKA.—Ch. IV. S. IV. 4. entered in 223 *c*..... 295 *a*

Do. Ch. IV. S. I. 5. entered in 213 *d*..... 295 *a*

DAYABHAGA.—Ch. II..... 295 *b*

9. The text of Yajnyawalkya ("The ownership of father and son is the same in land which was acquired by his father, or in a corody, or in chattles,") properly signifies, as rightly explained by the learned Udyota, that, 'when one of two brothers, whose father is living, and who have not received allotments, dies leaving a son; and the other survives; and the father afterwards deceases; the text, declaratory of similar ownership, is intended to obviate the conclusion, that the surviving son alone obtains his estate, because he is next of kin. As the father has ownership in the grand-father's

Page.

estate: so have his sons, if he be dead. There is not in that case, any distinction founded on greater or less propinquity; for both equally confer a benefit by offering a funeral oblation of food, as enjoined by obsequies. Such is the author's meaning.

10. Accordingly a great grand-son, whose father (as well as grand-father) is deceased, is in like manner an equal claimant with the son and grand-son. For he likewise presents a funeral oblation.

DAYABHAGA.—Ch. XI. S. I. 34..... 295 *b*

Accordingly (since benefits are derived from the great grand-son as well as from the son;) the term "Son" (in the text of Menu, Or in that of Vishnu. Or in those of Yajnyawalkya, &c,) extends to the great grand-son; for, as far as that degree, descendants equally confer benefits by presenting oblations of food in the prescribed form of half-monthly obsequies.

MITACSHARA.—Ch. I. S. V. 1 entered in 292 (*b*)..... 295 *b*

2. Although grand-sons have by birth a right in the grand-father's estate, equally with sons; still the distribution of the grand-father's property must be adjusted through their fathers, and not with reference to themselves. The meaning here expressed is this: if unseparated brothers die, leaving male issue; and the number of sons be unequal, one having two sons, another three, and a third four; the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So, if some of the sons be living and some have died leaving male issue; the same method should be observed: the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own father's respectively. Such is the adjustment prescribed by the text..... 295 *b*

VYAVAHARA MAYUKA.—Ch. IV. S. III. 1 entered in 270 *b*.

DAYACRAMA SANGRAHA.—But descendants only, as far as the fourth degree of one, who had remained all along in his own country, are entitled to share his wealth, for it has been formerly declared, that the fifth in descent and the rest confer no benefits on a deceased owner, since they are not competent to present funeral oblations to him at solemn obsequies..... 295 *b*

MENU.—'To three ancestors must water be given at their obsequies; for three (the father, his father, and the paternal grand-father) is the funeral cake ordained: the fourth in descent is the giver of oblations to them, and their heir, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake..... 295 *b*

Page.

MITACSHARA.—Ch. I. S. VII.. 295 *d*

1. When a distribution is made during the life of the father, the participation of his wives, equally with his sons, has been directed. ("If he make the allotments equal, his wives must be rendered partakers of like portions.") The author now proceeds to declare their equal participation, when the separation takes place after the demise of the father: "Of heirs dividing after the death of the father, let the mother also take an equal share."

2. Of heirs separating after the decease of the father, the mother shall take a share equal to that of a son; provided no separate property had been given to her. But, if any had been received by her, she is entitled to half a share, as will be explained.

VYAVAHARA MAYUKHA.—Ch. IV. S.IV..... 295 *d*

15. In a case of equal partition bewteen a father and his sons, a share belongs also to the wife; says Yajnyawalkya: "If he make the allotments equal, his wives, to whom no separate property had been given by the husband or the father-in-law, must be rendered partakers of like portions." If any had been given, they are only to get half, for he adds: "Or if any had been given, let him assign the half." The half; meaning, so much as, with what had been before given as separate property (Stridhana), will make it equal to a son's share. But if her property be (already) more than such share, no share (belongs to her.)

VYAVAHARA MAYUKHA.—Ch. IV. S. IV. 18 entered in 302 *b*.

MADHAVYA.—8. Yajnyawalkya has mentioned a peculiarity in the case of equal partition being made by the father: "If he makes the shares equal, then the wives are to have equal shares if they had no Stridhana given them by their husband, or father-in-law." If the father of his own accord makes the sons equal sharers, then the wives to whom Stridhana has not been given are to be made equal sharers with the sons; but if Stridhana has been given them, he should give them, a half," (*i. e.*) they are sharers in the half of the share of a son.

15. Yajnyawalkya has declared the arrangement of a mother's share in partition of a deceased person's property: "After the father's death, let a mother take a share equal (to the shares) of those who divide." Another Smriti says: "Let a mother who has no property of her own, take an equal share in the case of division by the sons." The meaning is that a mother who has no wealth, who is destitute of Stridhana of her own, should take when division is made by the sons a share equal to a son's share.

The mention of mother is to include other wives of the same husband. So Vyasa says: childless wives of the father are declared to be

Page.

equal sharers, and all grand-mothers, are declared equal to the mothers." But as for what some say, viz : that the meaning of the saying, " let a mother take an equal share," is that the mother should take wealth sufficient for her livelihood, that is not the case : for then the words ' equal' and ' share' would be useless. But it is said that if there be much wealth, she takes enough for her subsistence ; if there be little, a share equal to a son's, but this is also (wrong), because the rule (would have the defect) of being variable..... 295 *d*

SMRITI CHANDRIKA.—Ch. II.

38. If therefore, in the instance under contemplation, the father, of his own will, should make an equal partition, then Yajnyawalkya says, " If he make the allotments equal, his wives to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions."..... 295 *d*

Ch. IV. 13 entered in 25 (*e.*)

DAYABHAGA.—Ch. XI. S. I.

56. But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage or sale, of it. Thus Katyayana says, " Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it."

60. Thus in the Mahabharata, in the chapter entitled Danadhurma, it is said, " For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth."..... 295 *e* & 295 *f*

DAYACRAMA SANGRAHA.—Ch. I. S. II.

3. The wife is only to enjoy the estate of her deceased husband, she must not make a gift, mortgage or sale of it. So, Katyayana declares, " Let the childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. " After her, let the heirs take it."

4. " Abiding with her venerable protector," that is, having settled with her father-in-law, in her husband's family, let her so long as she lives, enjoy her husband's estate, and not (as she is entitled to do with her peculiar property,) make a will a gift, mortgage, or sale of it..... 295 *e*

VYAVAHARA MAYUKHA.—As for this text of Katyayana ; " After the death of the husband, the widow, preserving (the honor of) the family, shall obtain the shares of her husband, so long as she lives : but she has not property, (therein, to the extent of gift, mortgage or sale :" it is a prohibition of gift of money, or the like, to the Bandi, Charana,

Page.

and the like (swindlers). But gift for religious objects not (visible), and mortgage of the like, suitable to those objects, may even be made, since fixed and moveable property are both noticed, in the above quoted text: "Having taken," &c., (para 2nd) and from this of Katyayana himself: "A widow, actively engaged in meritorious observances and fasts, constant in the duties of widowhood, intent upon restraining (her passions,) and making holy gifts, even if wanting a son, shall reach the heavenly abodes." ..... 295 *e*

DAYABHAGA.—Ch. XI. S. II. 31..... 295 *f*

Or the word "wife" (in the text above quoted, section I. S. 56) is employed with a general import, and it implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance..... 296 *a*

MITACSHARA.—Ch. II. S. I. 20 entered in 31 *a*..... 296 *d*

Do. „ „ 30 entered in 245 *c*..... 296 *c*

39. Therefore it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man, who being separated from his coheirs and not subsequently re-united with them, dies leaving no male issue.

VYAVAHARA MAYUKHA.—Ch. IV. S. VIII. 6. entered in 31 *a*.....296 *a* & 296 *d*

DAYABHAGA.—Ch. XI. S. I. 1 entered in 95 *d*.....296 *b* & 296 *f*

2. Thus Vrihaspati says: "In scripture and in the code of law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him, whose wife is not deceased, half the body survives. How then should another take his property, while half his person is alive? Let the wife of a deceased man, who left no male issue take his share, notwithstanding kinsmen, a father, a mother, or uterine brother, be present. Dying before her husband, a virtuous wife partakes of his consecrated fire: or if her husband die (before her, she shares) his wealth: this is a primeval law. Having taken his moveable and immoveable property, the precious and the base metals, the grains, the liquids, and the clothes, let her duly offer his monthly, half yearly, and other funeral repasts. With presents offered to his manes, and by pious liberality, let her honor the paternal uncle of her husband, his spiritual parents and daughter's sons, the children of his sisters, his maternal uncles, and also ancient and unprotected persons, guests and females (of the family). Those near or distant kinsmen, who become her adversaries, or who injure the woman's property, let the king chastise by inflicting on them the punishment of robbery."

3, 4, and 5 entered in 234 *d*.

Page.

6. By this text, relating to the order of succession, the right of the widow, to succeed in the first instance, is declared. It must not be alleged, that the mention of the widow is intended merely for the assertion of her right to wealth sufficient for her subsistence. For it would be irrational to assume different meanings of the same term used only once, by interpreting the word wealth as signifying the whole estate in respect of brothers and the rest, and not the whole estate in respect of the wife. Therefore, the widow's right must be affirmed to extend to the whole estate.

7. Thus Vrhat Menu says, "The widow of a childless man, keeping unsullied her husband's bed, and presevering in religious observances, shall present his funeral oblation and obtain (his) entire share."

8. "His" is repeated or understood from the words "his funeral oblation;" for that term alludes to her husband. The meaning therefore is, 'the wife shall obtain her husband's entire share;' not 'she shall obtain her own entire share;' for the direction, that 'she shall obtain, would be impertinent, in respect of her own complete share. Since the intention of the text is to declare a right of property, it ought not to be interpreted as declaring such right in regard to the person's own share; for that is known already from the enunciation of it as that person's share, (and it need not therefore be declared.)

9. Nor should it be said, that the intention of the text is to authorize the taking (or using) of the goods, (not to declare the right of property;) for the taking or using of one's own property is a matter of course.....296 *b* & 296 *f*

DAYACRAMA SANGRAHA.—In default of the grand-son and great grand-son, the widow succeeds to the estate, in conformity with the text of Yajnyawalkya. "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates, pupil and a fellow-student: on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven, leaving no male issue. This rule extends to all classes."

VYAVAHARA MAYUKHA.—The wife, if faithful to her husband, takes his wealth: not if she be unfaithful; for it is declared by Katyayana: "Let the widow succeed to her husband's wealth, provided she be chaste." So Harita says: "If a woman becoming a widow in her youth, be headstrong, (suspected of incontinence) a maintenance must in that case be given to her, for the support of life." Prajapati: "Dying before her husband, a virtuous wife partakes of his consecrated fire; or if her husband die (before her, she shares) his wealth; this is primeval law." Consecrated fire, all the (five sacred) fires. The same author says: "Having taken his moveable and

Page.

immoveable property, the base and the precious metals, the liquids, and the clothes; let her duly offer his monthly, half yearly, and yearly funeral repasts; with presents offered to his manes, and by pious liberality, let her honor the paternal uncle of her husband, his spiritual parents, and daughter's sons, the children of his sisters, his maternal uncles, and also ancient and unprotected persons, guests, and females (of the family)" Base metals, namely, tin, lead, and the like..... 296 *c*

MITACSHARA.—Ch. I. S. I. 4 entered in 186 *a*.

Do. . Ch. II. S. I.

1. That sons, principal and secondary, take the heritage, has been shown. The order of succession among all (tribes and classes) on failure of them; is next declared.

2 entered in 95 *d*.

DAYABHAGA.—Ch. XI. S. I. 1 entered in 95 *d*..... 297 *a*

Do. „ „ 2 entered in 296 *b*.

SMRITI CHANDRIKA.—Ch. IV..... 297 *b* & *c*

5. The conclusion hence is that because it is stated in the Cruti that persons deficient in an organ of sense or member, *i. e.* persons who have lost it by reason of disease, &c., as well as females are deemed incompetent to inherit, therefore females are not entitled to heritage; that is, to wealth descending from the owner and admitting of partition.

6. By saying that persons deficient in an organ of sense or member and females are deemed incompetent to inherit, it is to be understood that the substance of the Veda called Taittiriyam to the effect that females and persons wanting in an organ of sense or member are incompetent to inherit, has been recited.

7. Here, however, an objection arises. If females are incompetent to inherit, how then did Yajnyawalkya say " Of heirs dividing after the death of the father, let the mother also take an equal share"? How did Vyasa say, " Even childless wives of the father are pronounced equal sharers, and so also are all the paternal grand-mothers: they are declared equal to mothers," and Vishnu, too, " Mothers receive allotments according to the shares of sons, and so do unmarried daughters "? These passages providing shares for mothers and the like must be incorrect, should the females be incompetent to inherit.

8. The reply is, they are fully correct. With regard to those that are incompetent to inherit, passages directing the allotments to them of heritage (Daya) may be incorrect, but not those which simply direct portions (amcan) to be given to them. Amcan signifies a portion and not (a share in) the heritage (Daya). We find it inserted

Page.

(in law books) that a portion (Amcam) may be given even out of property belonging in common to several.

9. Although the mother is disentitled to a partition of the heritage from want of property in the same, yet, since she possesses an interest in the partible wealth by reason of her being the widow of the deceased father, Yajnyawalkya and others must be understood to have permitted her, in compromise of such interest, to take wealth sufficient for her needs by way of a portion.

DAYABHAGA.—Accordingly (since there is not in such case a nullity of gift or alienation.) Nerada says: "When there are many persons sprung from one man, who have duties apart, and transactions apart, and are separate in business, and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."..... 298 *a*

DAYAKRAMA SANGRAHA.—Ch. XII. S. I. 9 entered in 209 *b* & *c*..... 298 *a*

NAREDA.—I. Dig. B. II. Ch. IV. S. I. V. 6 entered in 209 *b* & *c*..... 298 *a*

DAYABHAGA.—Thus there are two periods of partition; one, when the father's property ceases; the other by his choice, while his right of property endures.....298 *b* & 298 *d*

DAYAKRAMA SANGRAHA.—Ch. VI. 1 entered in 294 *c*..... 298 *b*

BAUDHAYANA.—With the father's assent, a partition of heritage may be made..... 298 *b*

DAYABHAGA.—Ch. I. 35 entered in 292 *b*..... 298 *c*

Do. Ch. III. S. I. 16. entered in 173 *a*.

MITACSHARA.—Ch. I. S. II. 7. entered in 267 *a*.....298 *c*

Do. „ S. VI. 8. entered in 231 *d*.

VYAVAHARA MAYUKA.—Ch. IV. S. IV..... 298 *e*

1. Menu: "After the death of the father and mother, the brothers, being assembled, may divide among themselves the paternal, (and maternal estate; but they have no power over it,)" while their parents live (unless the father choose to distribute it.) By inserting the word *and* the consummation of (both their) deaths is not required. Even thus, in the Madana Ratna and Smriti Sangraha: "A partition of the father's wealth may take place, even whilst the mother lives, for this reason, that without her husband, the mother does not from her independence also derive ownership. "A partition of the mother's wealth also may take place, in like manner while the father is alive, for, if there be issue, the lord (of the wife) is not lord of the wife's wealth."

2. This is opposed to a text of Brihaspati: "On the demise of both parents, participation among brothers is allowed: and even

Page.

while they are both living it is right, if the mother be past child-bearing." Nareda: "Let sons regularly divide the wealth, when the father is dead; or when the mother is past child-bearing, and the sisters are married; or when the father's sensual passions are extinguished." *Sensual passions*, desire *extinguished*, averse. The expression and the sisters are married, must be taken collectively with (the mother's child-bearing, and extinction of the father's) passions, after the simile of the crow's eye.

3. Gautama: "After the demise of the father, let sons share his estate. Or, while he lives, and the mother be past child-bearing, if he desire partition." From this expression, if he desire, partition is declared legal also, before the mother is past child-bearing, by the father's wish alone.

4. Entered in 224 *b*.

MITACSHARA.—Ch. I. S. II. 7. entered in 267 *a*..... 298 *f*

MADHAVYA.—5. We return now to the subject: Yajnyawalkya has also mentioned the time of partition: "If the father makes a partition he may at his will separate his sons, or he may give the eldest a superior share, or all may share alike." C. When the father wishes to make partition, then let him separate his sons at his will; this is the mode of partition at will. "Or the elder with a superior share;" this is the mode of partition with a deduction, viz., what is best of all the property for the eldest, a half then for the middle son, and a fourth for the youngest; "or all," viz., the eldest, and other sons are to be made equal sharers. But this unequal mode of partition refers to self-acquired wealth. The unequal division at the will of the father would be improper in the case of what is acquired by succession, as all the sons have an equal right in it.

6. Entered in 214 *a*.

8. Yajnyawalkya has declared the rule of partition after the death of both parents;—"After the death of both parents let the children divide equally the property and debts."

SMRITI CHANDRIKA.—Ch. I..... 298 *f*

33. The purport of the text hence is that if the father should lose his independence by old age or the like, the sons are then competent, at their own will, to make a partition of his property even without his will.

34. The phrase "attacked with lasting disease" used in the above text of Cankha, refers also to one influenced by lasting wrath. Hence, Nareda: "A father who is afflicted with disease or influenced by wrath or whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distri-

Page.

bution of the estate." Here add the words "but the sons have power." Who acts otherwise than the law permits. Who pursues a course not warranted by the law.

35. Entered in 267 *a*.

37. Baudhayana confers, in this instance, a power on the father to grant permission to effect the partition. "A partition of the heritage is to take place with the permission of the father."

DAYABHAGA.—Ch. III S. II..... 298 *g*

25. Harita ordains an equal destribution without deductions, in the following passage, after speaking of a father: "If he be dead, the partition of inheritance should be made equally." So Uçanas says, "This rule of partition is declared for brethren of various tribes, being born of woman of classes below the father's; but the distribution among brothers born of women of the same tribe is ordained to be made equally." Thus Paithinasi says, "When the paternal inheritance is to be divided, the shares shall be equal." Yajnyawalkya also declares," Let the sons divide equally the effects and the debts, after the death of both parents." Thus, there are two modes of distribution: namely with or without deductions.

26. It must not be argued, that the practice of equal partition is indispensable, as the only mode authorized by law. For the brethren may consent to the deductions by reason of great veneration (for the eldest.) An option exists like that of making or omitting partition.

27. Accordingly, since persons of the present day (who are younger brother) entertain not great veneration (for their elders,) equal distribution is alone seen in the world; as also because elder brothers deserving of deducting allotments are now rare.

DAYAKRAMA SANGRAHA.—But the mode by equal division is the only one adopted in the present age, because younger brothers are now-a-days seldom met with, who entertain this great veneration, and elder brothers deserving of it are (equally) rare..... 298 *g*

MITACSHARA.—Ch. I. S. III..... 298 *g*

2. After their two parents.] After the demise of the father and mother: here the period of the distribution is shown. The sons.] The persons, who make the distribution, are thus indicated. Equally.] A rule respecting the mode is by this declared: in equal shares only should they divide the effects and debts.

3. But Menu, having premised," partition after the death of the father and the mother," and having declared: "The eldest brother may take the patrimony entire, and the rest may live under him as under their father;" has exhibited a distribution with deductions, among brethren separating after the death of their father and mother: "The portion deducted for the eldest is the twentieth-part

Page.

of the heritage with the best of all the chattles ; for the middlemost, half of that ; for the youngest, a quarter of it." The twentieth-part of the whole amount of the property (to be divided,) and the best of all the chattels, must be given (by way of deduction) to the eldest ; half of that, or a fortieth part, and a middling chattel, should be allotted to the middlemost ; and a quarter of it, or the eightieth part, with the worst chattel, to the youngest. He has also directed an unequal partition, but without deductions, among brethren separating after their parents' decease ; allotting two shares to the eldest, one and a half to the next born, and one a piece to the younger brothers : " If a deduction be thus made, let equal shares of the residue be allotted : but, if there be no deduction, the shares must be distributed in this manner ; let the eldest have double share, and the next born a share and a half, and the younger sons each a share: thus is the law settled." The author himself has sanctioned an unequal distribution when a division is made during the father's lifetime, (" Let him either dismiss the eldest with the best share, &c.) Hence an unequal partition is admissible in every period. How then is a restriction introduced, requiring that sons should divide only equal shares ?

4. The question is thus answered : True, this unequal partition is found in the sacred ordinances ; but it must not be practised, because it is abhorred by the world ; Since that is forbidden by the maxim. " Practice not that which is legal, but is abhorred by the world, (for) it secures not celestial bliss :" as the practice (of offering bulls) is shunned, on account of popular prejudice, notwithstanding the injunction. " Offer to a venerable priest a bull or a large goat ;" and as the slaying of a cow is for the same reason disused, notwithstanding the precept " Slay a barren cow as a victim consecrated to Mitra and Varuna."

7. Therefore unequal partition, though noticed in codes of law, should not be practised, since it is disapproved by the world and is contrary to Scripture. For this reason, a restriction is ordained, that brethren should divide only in equal shares..... 298 *g*

VYAVAHARA MAYUKA.—Ch. IV. S. IV.

11. And this partition by deduction, is not respected in the Kali (or present) age, for it is one of the things (expressly) set aside in the present age, as has been already proved by me in my Samaya Mayukha.

MADHAVYA.—9. However in the case of partition after the death of both parents, unequal partition has been allowed by Menu :—" After the death of the father and mother the eldest son may take all his father's wealth, and the others should live in dependence on him, as on a father. The twentieth part is the share of the eldest, besides

that thing which is the best of all the wealth ; the half of that for the middle son, and the quarter for the youngest. But if no deduction is made then let the following be the arrangement of the shares ; let the eldest take a share and an additional one, the next son after him a share and a half, and the younger each a share, thus the rule has been laid down."

So also Gautama says : " The twentieth part, a pair of cows, a car and a pair of animals with teeth in both jaws yoked to it, and a bull (belong to) the eldest. Cattle blind of one eye, old or with broken horns or deformed tails, (belong to) the middlemost ; if there be many such (cattle), sheep, grain, iron, a house, a yoked (cart), and one of each kind of cattle (belong to) the youngest ; All the rest (is to be divided) equally." C. The meaning is as follow ; of all the wealth of the father a twentieth-part is (the share) of the eldest. " A pair ;" (*i.e.*) a pair of cows. " With teeth in both jaws ;" (*i.e.*) horses, mules, asses ; a car yoked with any of these as they may occur. " Lame ;" (*i.e.*) old. " With broken horns ;" (*i.e.*) the horns of which are injured." " Deformed in the tail ;" (*i. e.*) the tail of which is injured. Because there is no distinction made (in regard to them), a share for the middlemost is to be made of cows, horses, &c., of either kind as they occur ; but for the youngest, " grain ;" (*i. e.*) rice &c. " iron ;" (*i. e.*) metal and a yoked (cart) and one of each kind of cattle, viz, cows &c. (such) item by item in succession is the share of the youngest. Brihaspati says : " Let the eldest by birth, learning, or good qualities take a portion from the inheritance." Katyayana says : " So that that wealth having been divided may be used for sacrifices ; superiority in shares is to be arranged by the learned." Nareda has also in the case of partition during (the father's) life-time directed unequal partition : " The father advanced in years may of his own will separate his sons ; the eldest (he may endow) with a best share, or as he may wish. But those who have been separated by the father with equal, lesser, or greater wealth, let that be lawful for them, for the father is lord of all. Let the father when making a partition, keep two portions for himself." Brihaspati says : " If equal, less, or greater shares have been arranged by the father for any of them, such (shares) are to be maintained, otherwise they should be deprived." Thus then at partition during the father's life-time, or after (his) death is unequal partition allowed ; how then is it ordered that, " the sons should divide equally ? Quite so." Unequal division (is allowed) by the Sastra, nevertheless on account of the detestation in which it is held by every body, it is like the Anubandhya, &c., not carried out. As has been said by the authority of the summary ; Just as this practice of appointing (a widow) and also the killing of the Anubandhya (Paçu), so also at the present time partition after deduction

Page.

does not exist." Apasthambha also having given his own opinion: "Let him while living, divide equally the heritage between his sons," and having explained according to peculiar opinions, the taking by the eldest of all the wealth: "Some say the eldest succeeds," and having exhibited partition by deduction according to the opinion of others: "In some places gold, black cows, black produce (oil-seeds) belong to the eldest; (*or*) the chariot of his father and the house utensils; some say that the ornaments and wealth (given by) relations belong to the wife" disallows it as "forbidden by the Vedas;" that "Menu divided his property between his sons" without any difference, is said in the (Black Yajur) veda. "Therefore unequal partition though it is allowed by çastra is not to be made because it is opposed to public opinion and the çruti, and the rule that "they should certainly divide equally," prevails.

SMRITI CHANDRIKA.—Ch. II. S. II..... 298 *g*

2. Where the father is dead, the partition of the family estate which the brothers may make, must be made equally only.

SMRITI CHANDRIKA.—Ch. III.

23. What Vijnavecvura says: "True this unequal partition is found in the sacred ordinances, but it must not be practised because it is abhorred by the world," is not also proper, for, this too is not founded in truth. The people do not, in reality, abhor partitions attended with deductions or unequal distribution. On the contrary, they seem to be anxious to allow a greater portion to the eldest and other brothers if endowed with science, good qualities, and virtuous acts.

24. The compilers of Laws, "Cumboo," "Crikara," "Devaswami," and the like, have published volumes even in the present age on the subject of deductions, &c., under the impression that they are in some instances allowed by the usage of the great. The learned have, however, decided, with reference to religious books, Puranas, &c., that no such usage of the Great exists in the Kali age. We therefore thought that to treat the subject in detail would only swell the work uselessly, and accordingly gave but a hint of the matter.

DAYABHAGA.—Ch. III. S. I.

21. If there be one son living, and sons of another son (who is deceased,) then one share appertains to the surviving son, and the other share goes to the grand-sons however numerous. For their interest in the wealth is founded on their relation by birth, to their own father; and they have a right to just so much as he would have been entitled to..... 298 *h*

VYAVAHARA MAYUKA.—Yajnyawalkya declares the mode of partition among the sons of different brothers: "Among grand-sons by dif-

Page.

ferent fathers, the allotment of shares is according to fathers." It means, that if there be one son of one, two sons of a second, three of a third (or the like,) their shares will be solely according to the number of the fathers, and not in the number of sharers themselves. ..... 298 *h*

MADHAVYA.—13 entered in 231 *d*..... 298 *h*

SMRITI CHANDRIKA.—Ch. VIII. 1 to 7 entered in 231*d*..... 298 *h*

8. The same author further states " or (if that grand-son be also dead), let his son take the share ; beyond him succession stops."

VRIHASPATI.—Among brothers who are equal in class, but vary in regard to the number of sons produced by each mother, the shares of the heritage are allotted to the males, not to their mothers..... 299 *a*

DAYABHAGA.—Ch. III. S. II 25 entered in 298 *f*..... 299 *b*

29. When partition is made by brothers of the whole blood, after the demise of the father, an equal share must be given to the mother. For the text expresses, " The mother should be made an equal share."

32. Wives of the father (meaning step-mothers) who have no male issue, not those who are mothers of sons, must be rendered) equal sharers (with the sons.) So Vyasa ordains " Even childless wives of the father are pronounced equal sharers ; and so are all the paternal grand-mothers : they are declared equal to mothers." Vishnu likewise says, " Mothers receive allotments according to the shares of sons ; and so do unmarried daughters."

DAYABHAGA.—Ch. VI. S. I. 23 entered in 174 *c*..... 299 *c*

Do. Ch. II. 15 entered in 268 *a*..... 299 *d*

19.—Other texts should be explained in the very same manner.

DAYAKRAMA SANGRAHA.—A father has not the power to make an unequal distribution of ancestral property, consisting either of land or a corrody, or slaves, even though any of the causes beforementioned namely, the superior qualifications of one particular son, &c., should exist, and the text of Yajnyawalkya, which declares : " The ownership of father and son is the same in land, which was acquired by his father, or in a corrody, or in chattels," is intended to restrain the exercise of the father's will ; for (although contrary to the received opinion) (of equal ownership between father and son) it is impossible that, as long as the father, the owner of the ancestral property, continues to survive, his son should have ownership therein..... 299 *d*

MITACSHARA.—Ch. I. S. V. 3.

If the father be alive, and separate from the grand-father, or if he have no brothers, a partition of the grand-father's estate with the grand-son would not take place ; since it has been directed, that

Page.

shares shall be allotted, in right of the father, if he be deceased: or, admitting partition to take place, it would be made according to the pleasure of the father, like a distribution of his own acquisitions: to obviate this doubt the author says; "For the ownership of father and son is the same in land, which was acquired by the grand-father or in a corrody, or in chattels (which belonged to him.")..... 299 *d*

MITACSHARA.—Ch. I. S. II, 6 entered in 268 *a*.

VRIHASPATI.—Of property acquired by the grand-father, whether moveable or immoveable, equal shares are ordained for the father and the son..... 299 *d*

VYASA:—A father and his sons shall have equal shares of a house, or of land which had descended from ancestors; but, against their father's will, sons cannot claim a partition of wealth acquired by their father..... 299 *d*

DAYABHAGA.—Ch. III. S. II 26 entered in 298 *g*..... 299 *e*

MITACSHARA.—Ch. I. S. III 3 entered in 298. *g*..... 299 *e*

Do. Ch. I. S. II..... 299 *e*

11. To the alternative before stated (S 1) the author propounds an exception: "the separation of one, who is able to support himself and is not desirous of participation, may be completed by giving him some trifle."

12. To one who is himself able to earn wealth, and who is not desirous of sharing his father's good, anything whatsoever, though not valuable, may be given, and the separation or division may be thus completed by the father; so that the children, or other heirs, of that son, may have no future claim of inheritance.

MITACSHARA.—Ch. I. S. VI..... 299 *f*

2. The sons being separated from their father, one, who shall be afterwards born of a wife equal in class, shall share the distribution. What is distributed, is distribution, meaning the allotments of the father and mother: he shares that; in other words, he obtains after (the demise of) his parents, both their portions: his mother's portion, however, only if there be no daughter; for it is declared that "Daughters" share the residue of their mother's property, after payment of her debts.

3. But a son by a woman of a different tribe, receives merely his own proper share, from his father's estate, with the whole of his mother's property (if there be no daughter.)

4. The same rule is propounded by Menu: "A son, born after a division, shall alone take the paternal wealth." The term

Page.

parental (pitriyam) must be here interpreted 'appertaining to both father and mother:' for it is ordained, that "A son, born before partition, has no claim on the wealth of his parents; nor one begotten after it, or that of his brother."

5. Entered in 215 *c*
6. Entered in 231 *d*

DAYABHAGA.—The rule of distribution among sons extends equally to them and to grand-sons and great grand-sons in the male line. There is not here an order of succession following the order of proximity according to birth. For those three persons, the son, grand-son and great grand-son, do not differ, in regard to the presenting of two oblations at solemn obsequies, one which it was incumbent on the ancestor to present, and the other which is to be tasted by his manes. Hence it is, that Dévala says, 'A father, a grand-father, and a great grand-father, assiduously cherish a new-born son, as birds the holy fig tree, (reflecting) "he will present to us a funeral repast with honey, meat, and herbs, with milk, and with rice and milk, in the season of rains, and under the asterism Magha." So Cankha, Likhita and Yama, 'A father, a grand-father, and a great grand-father, welcome a new-born son, as birds the holy fig tree, (reflecting) "he will give us contentment with honey, and meat, and (especially the flesh of rhinoceros, and with milk, and with rice and milk, in the season of rains, and under the asterism Magha." From the mention of the great grand-father, it appears, that "son" here intends a descendant as low as great grand-son. Thus, since such a descendant confers benefits on his ancestors up to the great grand-father, by presenting oblations to the manes, the descendant within the degree of great grand-son has an equal right of inheritance..... 299 *g*

DAYAKRAMA SANGRAHA.—In default of the son, the grand-son takes the inheritance; and failing him the great grand-son. But a grand-son whose father is dead, and a great grand-son whose father and grand-father are dead, participate equally in the inheritance with the son for they without distinction confer equal benefits on the deceased owner of the property, by the presentation to him of funeral offerings at solemn obsequies..... 299 *g*

VYAVAHARA MAYUKA.—Ch. IV. S. III. 1 entered in 270 *b*..... 299 *g*

Do. Ch. IV. S. IV. 20 entered in 298 *h*..... 299 *g*

21. Katyayana: "Should a younger son die before partition, his share shall be allotted (by the elder brother) to his son, provided he had received no fortune from his grand-father." "That son's son shall receive his father's share from his uncle, or from his uncle's son; and the same (proportionate) share shall be allotted to all the brothers according to law." Or (if that grand-son be also dead)

Page.

his son takes the share; beyond him succession stops." The younger son (anuja) denotes also that the eldest (is bound to portion off his brother's son). Stops, at the great grand-son.

SMRITI CHANDRIKA.—Ch. VIII 6 and 7 enteredin 231*d*..... 299 *g*

Do. Ch. VIII. 8 entered in 298 *h*.

MADHAVYA.—Para 13 entered 231 *d*..... 299 *g*

14. Katyayana has laid down the rule for the case when a brother has died who is between two undivided brothers, and his son has not obtained a share from his grand-father who is also dead; "When an undivided younger brother is dead, one should make his son a sharer in the property if he has not received means of livelihood from the grand-father; he should receive his father's share from his paternal uncle or his *(i. e.)* uncle's son. That is the share of all the brother's according to equity, let his son *(i. e.*, the grand-son*)* receive that; let there be a cessation beyond:" "Let his son receive it." The meaning is this; The son of that grand-son as lord of the property capable of partition should in the default of his father receive his share; but as for others beyond him in succession, there is a cessation of the partition of an aged grand-father's property.

So Dévala says:—The rule is that partition extends to the fourth in descent among members of a family who are undivided co-parceners, and who live together. Such Members of a family are Sapindas; beyond them there is a cessation of the offering of funeral cakes."

MENU.—Ch. IX. 186 entered in 295 *b*..... 299 *g*

YAJNYAWALKYA.—But to grand-sons by different fathers shall be allotted the portions of their respective fathers..... 299 *g*

CATYAYANA:—Should a son die before partition, his share shall be allotted to his son, provided he had received no fortune from his grand-father:

2. That son's son shall receive his father's share from his uncle, or from his uncle's son; and the same proportionate share shall be allotted to all the brothers, according to law:

3. Or, if that grand-son be also dead, let his son take the share: beyond him succession stops..... 299 *g*

DEVALA.—II. Dig. B. V. Ch. II. V. 80. entered in 118 *a*..... 299 *g*

81. Dévala:—Partition of heritage among undivided parceners, and a second partition among divided relatives living together after re-union, shall extend to the fourth in descent: this is a settled rule.

82. Dévala:—So far, namely, as far as the fourth in descent, relatives are Sapindas, or connected by funeral oblations; beyond him

Page.

the funeral cake is rescinded: Sages declared partition of inheritable property to be co-ordinate with the gift of funeral cakes.

DAYABHAGA.—Ch. II. 17 entered in 168 *a*..... 299 *h & i*

22. The father has ownership in gems, pearls, and other moveables, though inherited from the grand-father, and not recovered by him, just as in his own acquisitions; and has power to distribute them unequally, as Yajnyawalkya intimates. "The father is master of the gems, pearls and corals, and of all (other moveable property:) but neither the father, nor the grand-father, is so of the whole immoveable estate."

DAYAKRAMA SANGRAHA.—Ch. VI. 8 entered in 267 *a*..... 299 *h & i*

19. But the father possesses a power in regard to ancestral property, other than land (and the descriptions above mentioned,) such as pearls, gems, similar to that which he has in the disposal of his own acquired wealth. Yajnyawalkya declares: "The father is master of the gems, pearls and corals, and of all (other moveable property:) but neither the father, nor the grand-father, is so, of the whole immoveable estate."

VISHNU.—II. Dig. B. V. Ch. I. S. II. V. 25 entered in 268 *a*.....299 *h & i*

YAJNYAWALKYA—II. Dig. B. V. Ch. I. S. II. V. 26 entered in 268 *a*... 299 *h & i*

VRIHASPATI:—Sons; to whom equal, less, or greater shares have been allotted by their father, should maintain such distribution; otherwise they shall be chastised..... 299 *h & i*

DAYABHAGA.—If the father, having separated his sons, and having reserved for himself a share according to law, die without being reunited with his sons; then a son, who is born after the partition, shall alone take the father's wealth; and that only shall be his allotment. But, if the father die after re-uniting himself with some of his sons, that son shall receive his share from the re-united co-heirs. 300 *a*

MITACSHARA.—Ch .I. S. VI..... 300 *b*

1. How shall a share be allotted to a son born subsequently to a partition of the estate? The author replies: "When the sons have been separated, one who is (afterwards) born of a woman equal in class, shares the distribution."

2. Entered in 299 *f*.

DAYABHAGA.—Ch. V. 11 entered in 51 *a*..... 300 *c*

MITACSHARA.—Ch. II. S. X..... 300 *c*

2. "An impotent person," one of the third gender (or neuter sex.) "An out-caste;" one guilty of sacrilege or other heinous crime. "His issue;" the offspring of an out-caste. "Lame"; depriv-

Page.

ed of the use of his feet. "A madman;" affected by any of the various sorts of insanity proceeding from air, bile, or phlegm, from delirium, or from planetary influence. "An idiot;" a person deprived of the internal faculty: meaning one incapable of discriminating right from wrong. "Blind;" destitute of the visual organ. "Afflicted with an incurable disease;" affected by an irremediable distemper, such as marasmus or the like.

5. Entered in 51 *a*

10. The sons of these persons, whether they be legitimate, offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares; provided they be faultless or free from defects which would bar their participation, such as impotency and the like.

DAYABHAGA.—Ch. VII..... 300 *d*

1. The share of a son born after the partition of the estate is now declared. On that subject Menu and Nareda say, "A son, born after a division, shall alone take the paternal wealth; or he shall participate with such (of the brethren,) as are re-united with the (father.")

3. Thus Gautama says: "A son begotten after partition, takes exclusively the wealth of his father."

4. He, of whom the conception was subsequent to the division of the estate, is a son begotten after partition; being procreated by a person, who is separated (from co-parceners:) for, without conception, there is no procreation. Therefore, if the sons were separated (from the father,) while his wife was pregnant but not known to be so, the son, who is afterwards born (of that pregnancy,) shall receive his share from his brothers.

5. Not one only, but even many sons, begotten after partition, shall take exclusively the paternal wealth. Thus Vrihaspati says: "The younger brothers of those, who have made a partition with their father, whether children of the same mother, or of other wives, shall take their father's share. A son, born after partition, has no claim on the paternal wealth; nor one, begotten after it, or that of his brother."

MITACSHARA.—Ch. I. S. VI. 2, 3, & 4 entered in 299 *f*..... 300 *d*

" " " 5 & 7 entered in 215 *c*.

" " " 6 entered in 231 *d*.

VYAVAHARA MAYUKA.—Ch. IV. S. IV..... 300 *d*

33. A distinction is thus declared respecting a son born after partition: "one born (to a man) separated (from his sons) will alone take the father's (wealth)." Brihaspati: "All the wealth, which is acquired by the father himself, who has made a partition with his sons,

Page.

goes to the sons begotten by him after the partition, those born before it, are declared to have no right :" " As in the wealth, so in the debts likewise, and in gifts, pledges, and purchases," they have no claims on each other, except for acts of mourning and libations of water." If there be nothing but debts, then that (son) is not even bound to pay those debts, without receiving a share from those formerly separated ; for, as will afterwards be shown, " He who takes the estate, must be made to pay the debts of it."

34. But if any one of them have re-united (with the father), a partition with that (son born after partition) shall be made. As is declared by Menu : " A son born after a division, shall alone take the paternal wealth or he shall participate with such of the brethren as are re-united with the father."

SMRITI CHANDRIKA.—Ch. XIII..... 300 *d*

6. Brihaspati says :— " The younger brothers of those who have made a partition with their father, whether children of the same mother or of different wives shall take their father's share."

" Their father's share" means their father's share only.

7. This passage is applicable to the case of sons, of whom the conception and birth were both subsequent to the division of the estate. The reason why such sons should take their father's share only, has also been stated by the some author. " A son born before partition has no claim on the paternal wealth, nor one begotten after it or that of his brother," has no claim on the paternal wealth). Has no right to the paternal wealth.

11. The conclusion hence is that the sons born before partition and the sons born after it have no claim whatever on each other's wealth, and in this respect they are viewed as if they were not related at all to each other.

MADHAVYA.—Paras 18. Yajnyawalkya has declared the manner of arrangement for the share of a son who is born after partition has taken place :—" A son who is born of a wife of the same caste among divided (sons), has a share." The meaning is this ; if after sons have been divided, a son by a wife of the same caste is born, he takes the father's share and the mother's also, if there be no daughters as is said :— " In default of those, the issues take."

19. But a son who is born of a (wife) not of the same caste (as the father) takes his share of the father's (property), and also all his mother's. So Menu has said :—" Let a son who is born after partition take the paternal property." What belongs to both parents is paternal wealth. This is according to the saying, " one born before partition has no power over his

Page.

parent's share;" (*i. e.*) the one who was born before partition has no power over the share of his father and mother, because he formerly entered into partition with his father, and the one born in a state of partition has no power over his brother's share.

20. What has been gained by the father after partition, that is the property of (the son who is) born after partition. Thus Menu has declared:—"What has been self-acquired by a father who has been separated from his sons, all that is the property of the son born after partition; the other sons born before have been declared to have no power with respect to it." Menu has also said that in the case of sons who have been divided and again united with their father there is partition for them with him who is born after:—" He should divide his property with those who have been re-united."

VRIHASPATI.—When a partition has been made between a father and his sons by the same wife or by different wives, the sons who may be born after the partition shall inherit the estate of the father:

2. A son born before it shall have no claim on the paternal estate unless he re-unite himself; nor a son born after it, or that of his brother: the duty of paying debts, and the right of giving, pledging, or selling, follow the property inherited; so that the son born after partition must pay the debts of the father contracted before it.

MENU.—A son, born after a division in the life-time of his father, shall alone inherit the patrimony, or shall have a share of it with the divided brethren, if they return and unite themselves with him..... 300 *d*

DAYABAHAGA.—Ch. VII..... 300 *e*

6 One, born previously to the partition, is not entitled to the paternal estate: nor one begotten by the separated father, to the estate of his brother. So the same author, declares: " All the wealth, which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition. Those, born before it, are declared to have no right: as in the wealth, so in the debts likewise, and in gifts, pledges and purchases.

8. " They have no claims on each other, except for acts of mourning and libations of water."

MITACSHARA.—Ch. I. S. VI 4 entered in 299 *f*..... 300 *e*

Do. do. 5 entered in 215 *c*.

Do. do. 6, 8, & 9 entered in 231 *d*,

Do. do. 10 entered in 194 *a*.

11. This must be understood to be likewise applicable in the case of a nephew, who is born after the separation of the brethren; the

Page.

pregnancy of the brother's widow, who was yet childless, not having been manifest at the time of the partition.

MITACSHARA.—Ch. I. S. VI 12 entered in 277 *b*.

VYAVAHARA MAYUKA.—Ch. IV. S. IV..... 300 *a*

35. Yajnyawalkya states a distinction, at a partition after the father's death, with respect to a son born immediately afterwards, by a mother or step-mother, or brother's wife, whose pregnancy was uncertain. "When the sons have been separated, one who is (afterwards) born, of a woman equal in class, shares the distribution." The partition is thus to be then effected: something is to be contributed by all the brothers, or others, who had previously shared, each something out of his own share, until the (posthumous son's) share is equal to their own. Vishnu: "Sons with whom the father has made a partition, should give a share to the son born after the distribution."

36. And this we must understand as allowing for (subsequent) expenses and income. For if it be so, then, says the same author: "His allotment must absolutely be made, out of the visible estate, corrected for income and expenditure." Out of the visible estate, out of the wealth actually forthcoming..... 300 *a*

SMRITI CHANDRIKA.—Ch. XIII.

1. Vishnu, referring to a son born after partition, says:—"Sons with whom the father has made a partition, should give a share to the son born after the distribution.

2. The meaning is: "If the sons divided the family property with their father while the latter's wife was pregnant but not known to be so, they shall give to the son who is afterwards born of that pregnancy, his share out of the shares which they had previously taken from ignorance of his existence. The father, for his own part, need give nothing to such a son out of his own share, but he is to take charge of the share which his other sons give as above stated on account of the son born after the partition, and live with him; it being necessary that he should protect him during his minority. Hence, it has been ordained by the text above quoted that a share to the son born after partition should be given by the sons alone with whom the father had already made the partition, and not by the father also.

9. Brihaspati, on the strength of the principle that a son born before partition has no claim on the paternal wealth, which is the first of the two principles contained in his own passage above quoted, says something more on the subject: "All the wealth which is acquired by the father himself who has made a partition with his sons goes to the son begotten by him after the partition. Those born

Page.

before it are declared to have no right to the property."

11. Vide *d*.

12. The same author, however, points by the following passage that there is a slight distinction in this respect: "As in the wealth, so in the debts likewise, and in gifts, pledges, and purchases, they have no claims on each other, except for acts of mourning and libations of water."

MADHAVYA.—Para 21..... 300 *e*

But how if a son be born after his father's death amongst divided sons? About this Yajnyawalkya has said: "Let his share be from that which is visible, allowance being made for increase and decrease."

The meaning is that for a posthumous son who is born after the time of partition, the share is his proper share of what is visible, Viz: of the property taken by his brothers, after allowing something for the increase and decrease, Viz: the waste and profit. But this must be understood to apply to the case of one who is born after partition, of a wife whose husband is dead, if her pregnancy was not apparent at that time. But if pregnancy be apparent, the birth of the child should be waited for, and partition then made. Add the partition of brothers is according to Vasishta's saying: "If any women are without children, till they get sons, there is no partition."

The son born after partition has no power of forbidding a gift of property by (his) parents to divide sons; and Yajnyawalkya has declared that what is given is not to be taken away: "What has been given by the parents to any one, let that be his property."

VRIHASPATI.—Vide *d*..... 300 *e*

MENU.—A son born after a division in the life-time of his father, shall alone inherit the patrimony, or shall have a share of it with the divided brethren, if they return and unite themselves with him..... 300 *e*

YAJNYAWALKYA.—When the father makes an equal partition among his sons, his wives must have equal shares with them, if they have received no wealth either from their lord or from his father..... 302 *a*

DAYABHAGA.—The equal paticipation of the mother with the brethren takes effect, if no separate property had been given to the woman. But, if any have been given, she has half (a share.) And, if the father makes an equal partition among his sons, all the wives (who have no issue) must have equal shares with his sons. So Yajnyawalkya declares: "If he make the allotments equal, his wives, to whom no separate property has been given by their husband, or their father-in-law, must be rendered partakers of like portions." "To a woman, whose husband marries a second wife, let him give an equal sum, as a compensation for the supersession, provided no separate

Page

property have been bestowed on her: but, if any have been assigned, let them allot half." ..... 302 *a*

MITACSHARA.—Ch. I. S. II. ..... 302 *a*

8. Two sorts of partition at the pleasure of the father have been stated; namely, equal and unequal. The author adds a particular rule in the case of equal partition; "If he make the allotments equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of life-portions.

9. When the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband, or by their father-in-law, must be made participants of shares equal to those of sons. But, if separate property have been given to a woman, the author subsequently directs half a share to be allotted to her: Or if any had been given, let him assign the half."

10. But, if he give the superior allotment to the eldest son, and distribute similar unequal shares to the rest, his wives do not take such portions, but receive equal shares of the aggregate from which the son's deductions have been subtracted, besides their own appropriate deductions specified by Apastamba: "The furniture in the house and her ornaments are the wife's (property.)"

MITACSHARA.—Ch. I. S. VII. 1 entered in 295 *d*.

VYAVAHARA MAYUKA.—In a case of equal partition between a father and his son's, a share belongs also to the wife; says Yajnyawalkya: "If he make the allotments equal, his wives, to whom no separate property had been given by the husband or the father-in-law, must be rendered partakers of like portions." If any had been given, they are only to get half, for he adds: "Or if any had been given let him assign the half." The half; meaning so much as, which had been before given as separate property (Stridhana), will make it equal to a son's share. But if her property be (already) more than such share, no share (belongs to her) ..... 302 *a*

DAYABHAGA.—Thus the father has a double share even of wealth acquired by his own son. For the expression is general: "Let him reserve two shares;" or "he may take two shares." Katyayana declares it very explicitly; "A father takes either a double share, or a moiety of his son's acquisition of wealth; and a mother also, if the father be deceased, is entitled an equal portion with the son." ..... 302 *b*

Page.

DAYABHAGA.—Ch. III. S. II.

30. Since the term mother intends the natural parent, it cannot also mean a step-mother. For a word employed once cannot bear the literal and metaphorical senses at the same time.

MITACSHARA.—Ch. I. S. VII. 1 and 2 entered 295 *d*.

DAYAKRAMA SANGRAHA.—If, however a partition be made during the life-time of the mother, then she must be made an equal sharer with her own sons, according to the text (of Vrihaspati) which declares, that the mother should on the decease of her husband be made an equal sharer with her sons."

VYAVAHARA MAYUKA.—Ch. IV. S. IV. 18 entered in 298 *g*..... 302 *b*

VRIHASPATI.—On the death of the father, the mother (janani) has a claim to an equal share with her own sons; his mother's (matarah) take the same share; and the unmarried daughters each a fourth of a share..... 302 *b*

VYAVAHARA MAYUKA.—Yajnyawalkya (premising): "Uninitiated brothers should be initiated by those, for whom the ceremonies have been already completed:" states a distinction in regard to initiation of sisters: "But sisters should be disposed of in marriage, giving them as an allotment, the fourth part of a brother's own share:" meaning, that a fourth part of such share as would be allotted to a son of such class as the sister (happens to be,) being given to each sister (according to her rank), they are to be initiated..... 303 *a*

DAYABHAGA.—Ch. III. S. II..... 303 *a*

34. Unmarried daughters, likewise, following the allotments of sons, take a quarter thereof. Thus Vrihaspati says, "Mothers are equal sharers with them; and daughters are entitled to a fourth part."

35. A son has three part s and a daughter one. So Katyayana declares: "For the unmarried daughter a quarter is allowed: and three parts belong to the son. But the right of the owner (to exercise discretion) is admitted when the property is small."

36. If the funds be small, sons must give a fourth part to daughters, deducting it out of their own respective shares. Thus Menu says, "To the maiden sisters let their brothers give portions out of their own allotments respectively: let each give a fourth part of his own distinct share: and they, who refuse to give it, shall be degraded."

38. Thus Yajnyawalkya, saying "Uninitiated brothers should be initiated by those for whom the ceremonies have been already per-

Page.

formed; but sisters should be disposed of in marriage, giving them as an allotment, a fourth part of a brother's own share:" declares the obligation of disposing of them in marriage, not their right of succession.

MENU.—Ch. IX. 108. entered in 118 *a*..... 303 *a*

MITACSHARA.—Ch. I. S. VII..... 303 *a*

5. In regard to unmarried sisters, the author states a different rule: "But sisters should be disposed of in marriage, giving them as an allotment, the fourth of a brother's own share."

6. The purport of the passage is this: "Sisters also, who are not already married, must be disposed of, in marriage, by the brethren, contributing a fourth part out of their own allotment. Hence it appears, that daughters also participate after the death of their father. Here, in saying "of a brother's own share," the meaning is not, that a fourth part shall be deducted out of the portions allotted to each brother, and shall be so contributed; but that the girl shall be allowed to participate for a quarter of such a share as would be assignable to a brother of the same rank with herself. "The sense expressed is this: if the maiden be daughter of a Brahmani, she has a quarter of so much as is the amount of an allotment for a son by a Brahmani wife.

9. Nor is it right to interpret the terms af the text, "(giving the fourth part") as signifying 'giving money sufficient for her marriage,' by considering the word "fourth" as indefinite. For that contradicts the text of Menu: "To the maiden sisters, let their brothers give portions out of their own allotments respectively: to each the fourth part of the appropriate share; and they, who refuse to give it, shall be degraded."

DAYAKRAMA SANGRAHA.—The sisters also of these shares must be rendered participators to the amount of a fourth share receivable by their brothers respectively, for the purpose of marriage..... 303 *a*

DAYABHAGA.—Ch. II. 65 entered in 302 *b*..... 303 *b*

66. The meaning of this passage is, that the father has a right to take either a double share or a moiety of his son's acquired wealth.

CATYAYANA.—Out of property acquired by a son, the father, if he be living, shall, on a division of the family, receive two shares in some cases, or half in others: and the mother, if the father be dead, shall take an equal share with her son..... 303 *b*

Page.

DAYABHAGA.—Here, the father has a moiety of the goods acquired by his son at the charge of this estate; the son, who made the acquisition, has two shares; and the rest, take one a piece. But, if father's estate have not been used, he has two shares; the acquirer, as many; and the rest are excluded from participation..... 303 *c*

303 (*d*) vide *c*.

DAYAKRAMA SANGRAHA.—Ch. VI. 8 entered in 267 *a*..... 303 *e*

HARITA.—A father, making a complete partition even during his life may either go to the forest as a hermit, or enter at once into the fourth order, or that of an anchoret; or he may divide a small part of his fortune among his sons, and remain in his house, keeping the greater part of it, but without concealing any portion of his wealth: should he lose, by some calamity, what he reserved, he may take back from them, for his maintenance, what he gave; but he must give a portion to sons reduced to indigence..... 303 *e*

DAYABHAGA.—Besides it is an uncontested rule, that an acquirer, as such, shall have two shares of wealth gained by the use of joint-funds: for that allotment has been ordained by a text (of Vyasa) above cited in the single case of the use of common stock. It is not reasonable to assign two shares only in the instance of an acquisition made by personal exertion upon separate funds: but some thing more (than two shares) would be reasonable; either the whole, or something less (than the whole). Here since something less (than the whole) has not been directed either by sages or by compilers; and since it appears, that the rest of the brethren participate (in one case) on account of the employment of their common stock; it is fit, that their participation should be null (in another case) where that does not exist..... 303 *f*

MITACSHARA—Ch. I. S. IV. 1 entered in 174 *c*..... 303 *f*

Do. „ 2 entered in 178 *b*.

DAYAKRAMA SANGRAHA.—Therefore these three descriptions of property, viz: ancestral property, wealth acquired by a father, and that which has been acquired by the expenditure of joint-stock, are partible among all; but wealth acquired by individuals throu gh their own exertions, (such as partnership in trade &c.,) must be shared exclusively by the acquirers. This is settled..... 303 *f*

DAYABHAGA.—Ch. VI. S. I.

24. Moreover the text of Katyayana (is similarly founded on reason.) "When brethren separated in regard to the patrimony, and subse-

Page.

quently living once together, make a (second) partition, he, from whom, an acquisition has proceeded, shall again take a double share." 303 *g*

28. entered vide *f*.

DAYAKRAMA SANGRAHA.—Consequently the acquirer has two shares of wealth which has been acquired by the expenditure of the joint-stock, and the rest have only one share each. So Vyasa says : " Whatever wealth a man gains with the aid of the patrimony, by valour and the like, the brothers are sharers therein. To him must be allotted two shares, and the remainder should be made equal sharers."..... 303 *g*

DAYABHAGA.—Ch. VI. S. I. 4 entered in 178 *b*..... 303 *h*

MITACSHARA.—Ch. I. S. V. 1 entered in 292. *b*..... 303 *h*
Do. „ 2 entered in 295. *b*.

MITACSHARA.—Ch. I. S. IV. 31 entered in 235 *b*..... 303 *i*

SMRITI CHANDRIKA.— VI.

1. Katyayana, " What belonged to the grand-father or to the father and any thing else (appertaining to the co-heirs having been) acquired by themselves must all be divided at a partition among heirs."

2. Acquired by themselves] Acquired with the use of the paternal or other common wealth ; for, an acquisition without the use of such wealth is indivisible.

3. There are thus three kinds of property that are divisible. But this is only where there may be no debts contracted by the grandfather and the like. Where there exist such debts, the whole property is not to be divided, but only so much of it as remains after discharging the debts.

SMRITI.—Ch. II. S. I.

26. Vridha Brihaspati prescribes a different mode of partition by allowing a greater share to the father. " The father may himself take two shares at a partition made in his life-time." It must be read here " at a partition made by the father himself in his life-time."

27. Likewise ; Nareda : " Let the father, making a partition, reserve two shares for himself."

28. By saying " making a partition," it is made manifest that two shares may be reserved by the father, only where he the father, makes the partition, but not where the sons make it during his life-time.

Page.

29. Even in the case of partition made by the father, Cankha and Likhita allude to a distinction in regard to the father reserving two shares for himself: "If there be one son, let himself (the father) reserve two shares."

30. The word "himself" used in the passage refers to the father in the instance. By the mention of the condition, "If there be one son," the passage must be understood to apply to such a case only as where the father is past the time of begetting, or in other words, where the father is decayed by age..... 303 *j*

DAYAKRAMA SANGRAHA.—Ch. VI. 11 and 14 entered in 268 *b*..... 303 *k*

Do. „ 12 and 13 entered in 268 *a*.

SMRITI CHANDRIKA.—Ch. II. S. I. 24. entered in 268 *b*..... 303 *k*

MITACSHARA.—The father next propounds another period of partition, other persons as making it, and a rule respecting the mode. "Let sons divide equally both the effects and the debts, after (the demise of) their two parents."..... 305 *a*

SMRITI CHANDRIKA.—Where there are several widows (Patnis), it is proper that they should all take the inheritance of their sonless husband by dividing the same in equal shares among them..... 305 *b*

MITACSHARA.—On failure of the father, brethren share the estate. Accordingly Menu says, "of him, who leaves no son, the father shall take the inheritance of the brothers."..... 305 *b*

MITACSHARA.—Ch. I. S. XII. 1 and 2..... 305 *c*

1. The author next delivers a special rule concerning the partition of a Cudra's goods. "Even a son begotten by a sudra on a female slave, may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share: and one, who has no brothers, may inherit the whole property, in default of daughter's sons."

2. The son, begotten by a sudra on a female slave, obtains a share by the father's choise, or at his pleasure. But after (the demise of) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as is the amount of one brother's allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only.

Page.

DAYABHAGA.—By the reasoning thus set forth, if the elder brother have two shares of the father's estate, how should the highly venerable father, being the natural parent of the brothers, and competent to sell, give or abandon the property, and being the root of all connexion with the grand-father's estate, be not entitled, in like circumstances, to a double portion of his own father's wealth? Vrihaspati, extending to the eldest son to right to a double share because he is like a father, as expressed in a passage above cited does thereby intimate a maxim, that the father shall have two shares: and the maxim is actually propounded by Vrihaspati; for he ordains such an allotment in general terms: "The father may himself take two shares at a partition, made in his life-time." So Nareda says: "Let the father, making a partition, reserve two shares for himself; and the mother shall take an equal share with her sons, if her husband be deceased." ..... 306 *a*

MITACSHARA.—Ch. I. S. IV. 2 entered in 178 *b* ..... 306 *b*

Do. „ 6 entered in 174 *c* ..... 306 *d*

Do. „ 3 entered in 174 *c* ..... 306 *e*

INDEX.

A

ABIMANA PUTRA; See *Adoption.* . . . . . *Page.*
ABSENTEES; RIGHTS OF: See *Division* 295
ACCOUNT, STATED AND SETTLED. See *Minority* . . .
ADHYAGNI; See *Stridanum.* . . . . . .

ADOPTION;

Datta homum not essential in Bramin family. 52,62
Giving and Receiving constitute valid 52
objects of 58
„ to save ancestor's soul from *Put* 58
carries with it temporal benefits 59
cannot be made in favor of remote ancestor 59,61
Kshatrayia, what 59
kinds of sons now recognised 59
intention to, may be abandoned 62
no ceremonies indispensable 62
is act of husband 62
wife may join, but her consent not necessary 62
„ obtains spiritual benefits from 62,102
adopted becomes son of both 62
„ performs funeral rites of both 62
among *Sikhs* no ceremonies necessary 62
no writing necessary 63
but writing expedient, as evidence 63
execution of deed, without giving and receiving, insufficient. . 63
proof of ceremonies dispensed with, where adoption long recognised . 64
after *Oopanyana*, adoption invalid 65
age at which *Oopanayana* performed in the several castes . . 65
Oopanayana does not attach to *Soodras* 65
age for adoption 65
tonsure in natural father's house *after* gift, does not invalidate . 65
whether adult can be adopted, Quære 65
who may be adopted 65
„ not a man's natural brother 66
elder brother cannot give younger 67
test is, whether adopting father could have married boy's mother *in her maiden state* 67,68,69
Bramin may adopt brother-in-law 68
In three regenerate classes, sister's son cannot be 68
In *Soodra* caste he may be 68

ADOPTION—*(continued.)* *Page.*

Grand nephew may be 69
Bramin cannot adopt sister's son in Bengal, or *Sudra* country, or N. W. Provinces 69
sister's son in *Mitthila*, according to *Kritrima* form, may be . 70
in *Mitthila*, brother cannot adopt brother 70
Kritrima does not require husband's authority 70
„ good after *Oopanayana* 70
„ agreement of both parties to, necessary 70
„ by *parol*, without ceremonies, good 70
„ in *Tirhoot*, brother's son, if living, must be adopted . 70
„ even though only son 71
„ in *Behar*, succeeds to property of natural and adoptive family. 70
of only, or eldest son, in *Madras*, valid 71
„ „ In *Bengal*, invalid 73
Dwyamushyana 71,73,102
'eldest son,' means eldest living at time 75
„ of one wife may be given, if there be son by elder wife 76
second son given, elder dying after, adoption may proceed . . 76
after boy's marriage, invalid 76
but see case in Bombay, *aliter*; *quære* 76
by Leper, when good or bad 76
according to *Alya Sultana* law 76
„ to *Maramookatayam* 76
by widower, valid 77
by widow, *durante minoritate*, good 77
by *minor*, under Court of Wards 77
by unmarried man (*Bramachan* or *Bachelor*) good . . . 77
by widow of dumb, or madman, good 77
by dancing girl, if daughter, good 77
during life of natural or adopted son, bad 78
subsequent death of, will not validate second 78
second, *after* death of first, good 78
authority, conditional on death of first, good 78
but widow need not obey such authority 78
not good, if conditional to be executed on *disagreement* with existing son 78
double adoption, simultaneously, in Bengal, *semble* . . . 78
whether widow may adopt a second son on death of first, under *general* power 79
where two widows, if so authorized, they may adopt in succession . 81
where husband, after giving wife authority, himself adopts, he tolls the authority 81
triple simultaneous adoption, bad 81
doctrine as to *Gotrum* 81
of an *orphan*, illegal 82
where natural son incompetent to perform funeral ceremonies, father may adopt 83
made while adoptive mother pregnant, bad 83

ADOPTION—*(continued.)* *Page.*

Abimana Putra, what 83
Pallaka Putra, what 83
By widow 84
„ husband's authority necessary in Bengal or Benares . 84
son's authority to mother in Bengal necessary . . . 84
husband's authority, not required in Madras or Bombay . 84,86
nor son's to his mothers adoption 84
of adopted son, not mother-in-law, party to adopt . . 84
will, sufficient authority to widow 84
in *Behar*, husband's authority requisite . . . 85
in *Barellly*, also 85
in *Mitthila*, even husband's authority inefficacious . . 85
by *Jain* Shastras, no authority required, . . . 86
in *Pondicherry*, husband's authority not requisite . . 88
in Madras, consent of husband's *Sapindas* supplies want of authority 88
whether any consent neccessary, *Quære* . . . 88
what consent, if any, necessary 88
consent inefficacious, where husband has forbidden adoption 89
where no prohibition, permission 90
law same as to both *giving* and *receiving* . . . 90
consent, where presumable 92
„ or authority proveable by *parol* . . . 92
but if by *parol*, strict proof required . . . 92
and widow's oath alone not sufficient . . . 92
„ may be established by probabilities . . . 93
publicity desirable 93
husband cannot confer larger power than he has himself . 93
power to two widows to adopt, bad 93
where written authority, boy need not be designated . . 93
if designated, can another be adopted? 94
whether man with son can authorize widow to adopt a son, *quære* 95
adoption by widow divests her of estate . . . 95
widow neglecting to execute authority 97
„ refusing „ „ . . . 97
„ after adopting, cannot contract 97
son may covenant not to deprive widow of possession . 97
„ may adopt at any time 99
but the sooner the better 99
Legal effect of. 99
adopted forfeits all rights in natural family . . . 100
nor does natural family succeed to him 100
is not liable for natural father's debts 101,244
nor in Canara and Malabar 101
where widow adopts, boy succeeds to grand-father's estate as well as father's 101,171

ADOPTION—*(continued.)* *Page.*

succeeds collaterally as well as lineally 101
does not succeed to maternal grand-father's, estate, where collateral heirs 101
adopted by husband is not heir to the wife 101
Kritrima, in *Mitthila*, does not convey right to collateral succession 101
son adopted by wife is not heir to husband 101
son adopted by both, heir to both 101
adopted cannot abandon his *status* 101
nor be disinherited after adoption 101
son of *Goorookul* 101
Dwyamushyana succeeds to natural and adoptive lines . 102
valid adoption cannot be cancelled by will 102
„ nor for informality 102
„ but only for physical defects 102
where son adopted on condition, whether non-performance by him, invalidates; *Quære* 102
birth of natural son, after, divests adopted of three-fourths of estate. 103
where invalid, boy reverts to natural family 103
Limitation 106
effect of acquiescence 107
See *Division* 300

ADULTERER; See *Marriage* . . . . . .
ADVANCEMENT; See *Benamee* . . . . . .
ALIENATION;
restrained power of occupant 150
incohate right of sons by birth 150
power over self-acquired personalty 150
See *Undivided family* . . . . . .
ALYA SULTANA. See *Maintenance. Marriage. Adoption.* . .
„ *Undivided family*, (manager). 210
„ *Division.* 295
ANANDRAVEN. See *Undivided family.* 210
ANCESTRAL PROPERTY: See *Undivided Family*; *Division* . .
ANCESTRAL TRADE. See *Division.* 295
ANITYIA. See *Adoption.* 55
ARSHA. See *Marriage*: 'species of.' . . . . . .
ASCETIC. See *Debt* . . . . . .
ASSETS. See *Debt.* . . . . . .
Debts follow assets. 243
AUSOORA. See *Marriage.* . . . . . .

B

BASTARD. See *Marriage.* . . . . . .
how far bastardy disqualifies from Caste 5
it does not affect bastard's legitimate children . . . 5
„ not '*nullius filius*' 6

BASTARD—*(continued.)* Page.
has subsidiary rights of inheritance 6
in the three regenerate Classes 6
can perform obsequies 6
now, entitled to maintenance 6
among *Soodras*, entitled to inherit 6
son of slave-girl and concubine, difference between . . 7
son of slave by man of regenerate caste entitled to maintenance only 7
son of slave by *Soodra*, inherits 7
„ of *Soodra*, by concubine, only entitled to maintenance . 7
of *Soodra*, by woman of another caste, entitled only to maintenance, according to *Jimuta Vahana* 8
of Christian father on Hindu woman, See *Undivided family*. . 193
BEHAR. See *Adoption. Undivided family* . . . . .
BETROTHAL. See *Marriage*. . . . . .
BIGAMY. See *Marriage*. . . . . .
BLIND. See *Stridanum*. . . . . .
BOUNDS, METES AND; See *Division*. . . . . .
BRAMA. See *Marriage*. species of . . . . . .
BRAMACHAN. See *Adoption* . . . . . .
BENAMEE.
Purchase by father, in name of one of his sons; presumption is in favour of its being Benamee 134,187
though in English form of conveyance 134
son held trustee for father 134
resulting trust 140
advancement: . . . . . , 140
„ how rebuttable 140,149
customary among Hindoos 147,158
criterion, whence the money comes 148
circumstances proveable by *parol* 157
does not constitute Trust under Limitation Act . . . 158
purchase in name of idol 159
father may provide against insolvent son 159
„ conveying to daughters, shall not defeat creditors . . 159
benamee holder must show beneficial ownership . . . 159
Courts will not let Benamee transactions injure third parties . . 159
beneficial owner bound by standing by 159,202
b. f. vendee for v. c. from *Benameedar* protected . . 159,160,201
onus of proof 160
relative purchasing, is not b. f. purchaser 162
heirs and representatives of purchasers from *benamee*, in fraud of creditors, bound 163
party cannot plead own fraud, nor can his representatives . . 163
principle applies to Defendants and Plaintiffs 166
Trust cannot be avoided by form of instrument . . . 166
adverse possession for 12 years by beneficial purchaser extinguishes *Benameedar's* nominal title 168

BENAMEE—*(continued.)* *Page.*
and creates good title in former 168
See *Undivided family* 186

C

CASTE. See *Marriage.* . . . . . .
'CAVEAT EMPTOR.' See *Minority and Guardianship. Undivided family.* 200
Purchaser. . . . . . .
rule applied. 232
CEREMONIES. See *Marriage* . . . . . .
COLLATERALS. See *Division* 295
CONCUBINE. See *Bastard* . . . . . .
COMMENSALITY. See *Undivided family* . . . . .
Division. . . . . . .
CONSENT. See *Marriage. Undivided family* . . . . .
„ of all members of undivided Members to sale by one . . . 208
CONSIDERATION. See *Debt. Marriage.* . . . . .
CONTRACT;
of marriage. See *Marriage* . . . . . .
See *Division. Undivided family* 188
CONTRIBUTION. See *Undivided family.* . . . . .
Debt. . . . . . .
CONVERT. See *Marriage* . . . . . .
CO-PARCENARY. See *Undivided family* . . . . .
CORPUS. See *Division. Undivided family* 188
CUSTOM. See *Usage. Family-Custom. Division. Zemindar.* . .

D

DAIVHA. See *Marriage*: species of . . . . . .
DATTA HOMUM. See *Adoption* . . . . . .
DAUGHTER.
father bound to provide husband for 1
See *Stridanum* . . . . . .
See *Division* 297
DAYABHAGA. See *Stridanum* . . . . . .
DIVISION:
See *Undivided family passim.* Minors share to be secured on, . 131
actual separation, how far necessary 181,264
may be inferred from circumstantial evidence 182
„ „ what circumstances 182
presumable from long acquiescence 187
„ from litigation *interse.* 188
one member may purchase from another 188
may contract together in respect of all acquisitions . . . 188
e. g. for advances for improvements . . . 188-9
income, division of, consistent with undivision as to *corpus* . . 189
mere separate possession no proof of 190
alienation of shares 190

DIVISION—*(continued.)* *Page.*

Parcels held in severalty 190
Lumbadar, entry of one as 190
„ possession of, is for all 190
Collector's Register: mutation of names is evidence of . . . 190
Shrad, joint performance of, consistent with non-division . . 190
Commensality consistent with 190
indicia of, ordinary 210
after, members continue liable for previously incurred family debts . 243
agreement for, is equivalent to 264
before division, no member can predicate that he has a certain definite share 264,276
by metes and bounds not necessary 265
two-fold meaning of 'division'. 265
importance of doctrine of 267
What constitutes division 268-278
various doctrines as to, over-ruled 268
agreements partially acted on 269
no division into parcels necessary *(Mitacshara)* 270
declaration of intention to divide 274
party having ascertained share may alienate before division . . 275
unequivocal act or declaration of intention necessary. . . 275
what estops denial of division 275
unsigned memorandum of, insufficient 275
defined shares and independent enjoyment necessary . . . 275
division in fact binds as much as one by agreement . . . 276
symbolical division 276
need not be in writing 276
verbal evidence of, sufficient 276
may be inferred from circumstances 277
made during minority of some members, good 277
What things are not divisible 278-282
A Raj 278
Regalities and ancient Zemindaries 278
Primogeniture in ancient Zemindaries 278
„ not in modern Zemindaries 278
Jaghire 279
Pollium 279
Lands in Ghatwally tenure 279
Enams 279
Grants for maintenance 279
Pattam 279
Religious endowments 279
„ „ how enjoyed 279
Mohabur 280
Self-acquisition 280
Land purchased by individual with borrowed capital . . . 280
impartible property not therefore self-acquisition . . . 280,291

DIVISION—*(continued.)* *Page.*

science, &c., property gained by, rule as to 280
Yautaca 282
Malabar law 282
What things are divisible 282,292
ancient Zemindaries, when 282
Enams in S. Mahratta country 283
Toras Goras 283
Mootahs 283
Shotriums, proceeds of 283
Lands granted for maintenance, annual produce of, . . . 279
science, gains by, when 280
Rajah, &c. private estate of 283
Zemindar, personal property of 28,34
Jaghiredar, accumulations by 284
Religious endowments, management of 286
Ancestral family property . . . . . , 287
„ „ „ what constitutes . . . , 287
Joint-acquisition, according to Mitthila law 290
Patrimony, property acquired by 290
Purchase by joint-member drawing income from family . . 291
House built by one, on family land 291
Family dwelling house 291
Lands in Parguvally tenure 292
improvements, money spent on, to be accounted for on division . 292
Zemindary acquired by joint-purchase 292
Land passing from family where primogeniture the rule, to family wherein division, become divisible 292
Who may compel a division 292
all members who form co-parcenary 292
son, grandson 292,297
under Mitacshara law 294
under Bengal law, son cannot compel father 294
in Bombay, son cannot compel division of moveables . . . 295
„ „ of ancestral trade 295
division claimable by fourth in descent 295
„ right of, does not extend to collaterals . . 295
holder of portion of ancestral estate, in lieu of profits, may claim . 275
absentees, rights of 295
widow cannot claim, of husband's estate, under *Mitacshara* . . 295
aliter, under *Dayabhaga* 295
widow entitled to share on division 295
„ holds her share for life only 295
mother, on footing of widow 295
childless widow of husband having no nearer heirs may enforce, where husband's share ascertained 296
son-less widow of undivided brother, cannot 296
„ may sue for husband's joint-share in Bengal . . 296

DIVISION—*(continued.)* Page.
but not for property never in his possession 297
unless he had vested right in it 297
widow cannot sue for, while son alive 297
„ of undivided brother, in Bombay 297
daughters cannot claim 297
party out of possession may sue for 297
purchaser of *Lakiraj* may enforce 297
grand-mother cannot enforce 297
without father's consent, illegal 298
with father's consent, may be made in his absence 298
without consent, does not bind even sons who made it 298
will, cannot prevent division 298
Time of Division . . . . . .
in Bengal 298
in Bombay 298
in Madras 298
How property is to be shared . . . . . .
sons share equally 298
primogeniture, no larger share for 298
issue of younger share equally with issue of elder 298
sons share according to number of issue, not of mothers . 298
Putra Bhaga and *Putni Bhaga* 298
where division may be according to *Putni Bhaga* . . . 299
Putni Bhaga prevalent among *Soodras* 299
mode of division properly referred to *Panchayet* by guardian . 299
where division made by widows, grand-mother not entitled to share . 300
ancestral property divisible equally 300
though parties may by agreement alter shares 300
unequal division in favour of adopted son 300
jus representationis obtains on division 300
in *Bengal*, father may divide self-acquistion, or moveables, among children, unequally 300
aliter, in *Madras* 300
aliter also of ancestral estate in Bengal 300
in *Bengal*, father dividing self-acquired land must reserve own share, while wife is capable of child bearing 300
father so reserving, may give his share to any son 300
representative of insane sharer takes his share 300
where widow and daughter share, they take reserved share to exclusion of sons 300
son, born after division, takes father's reserved share . . . 300
provided he was conceived at date of division 300

DEBT.
liability of joint estate for joint and several 241
joint-family property liable for joint-family debt 241
share of each member liable for his separate debt 241
may be sold for his separate debt in execution 241

DEBT—*(continued.)* *Page.*

sale of father's interest for family debt extinguishes contingent interest of sons 241
to bind, must be for good consideration 241
gambling &c. bad consideration 241,242
even for nuptials or other ceremonies, must not be excessive . . 241
incurred to pay Government Kist, binds 241,250
arbitrary deduction from creditior's bill without his consent, illegal 242
member paying joint-family debt entitled to *contribution* from others . 242
son paying father's, may retain amount of father's share . . 242
form of decree in suit for contribution 242
debt must be a family debt 242
after division, members continue liable for previous joint-family debts 243
debts follow assets 243
qu: whether they can be pursued in hands of *b. f.* purchaser for valuable consideration 243
in such case, creditor retains personal remedy against heir &c . 243
son liable for father's debts to extent of assets 243
„ qu. whether liable without assets 244
adopted not liable for natural father's debts 244
grandson with assets liable 244
without assets, liable according to *Mahratta* law, though not for interest 244
the creditor must wait till sufficient acquired to pay . . 244
heir once with assets liable, though assets subsequently lost . . 244
property, not person, liable 244
whether estate passes to co-sharer by surviorship *cum onere*, qu. . 244
widow liable to extent of assets received from husband . . 247
see "*Principal and Surety*"
of missing person, must be paid by them who take his estate . . 250
Tarawad taking deceased *Karnavan's* estate liable. . . 250
father not liable for son's debt without assets . . . 250
„ „ or debt for family use or religious observances which family bound to perform 250
successor to widow bound by her necessary debts . . 250
debts of ascetic follow assets in hand of representative . . 250
debt evidenced by writing may be discharged by *parol* . . 250

DIVORCE. See *Marriage* . . . . . .
DUMB MAN. See *Marriage* . . . . . .
DWELLING HOUSE, FAMILY: See *Division* . . .
DWYAMUSHYANA. See *Adoption* . . . . . .

E

ENDOWMENTS: See *Religious Endowment* . . . . .
ENAM. See *Division* . . . . . .
EXCHANGE. See *Undivided Famild.*
of lands need not be endorsed by writing 276

F

Page.

'FACTUM VALET &c.' rule prevails in *Bengal* . . . 301
FATHER.
See *Marriage. Undivided Family.* . . . . . .
Debt. Division. . . . . . .
FAMILY DWELLING HOUSE. See '*Division*' . . . .
FRAUD. See *Benamee* . . . . . .
can a party plead his own, or of those he claims through, for his own benefit? 185

G

GAMBLING. See *Debt.* . . . . . .
GHANDARVA. See *Marriage*: species of . . . . .
GHATWALLY TENURE: See *Division* . . . . . .
GIFT.
see *Undivided family.* . . . . . .
in *Bengal*, father may give all to one son 214,237
verbal, followed by possession, good 276
GOOROOKUL. See *Adoption* . . . . . .
GOTRUM. See *Adoption* . . . . . .
GOVERNMENT KIST. See *Debt* . . . . . .
GRANDMOTHER. See *Division* 297
GRANDSON. See *Debt* . . . . . .
GRANTS FOR MAINTENANCE: See *Division* . . . .
GUARDIAN.
right of to dispose of girl in marriage. See *Marriage.* . . .
see *Minority and Guardianship.* . . . . . .
Manager . . . . . .

H

HABEAS CORPUS. See *Marriage.* . . . . . .
lies for Hindu father to recover daughter 1
HEIRS. See "*Debt*" . . . . . .
with assets liable to that extent for ancestral debts . . . 243
HUSBAND.
father of girl bound to provide one for her 1
See *Marriage. Stridanum* . . . . . .
HUSBAND AND WIFE.
purchaser from wife, husband alive, without enquiry, not protected . 202
husband when liable for wife's debts 247
„ liable for debts contracted by wife when she manages . . 248

I

"ILLATOM." Custom of among Reddy Caste, See *Undivided family* . 184
ILLEGITIMACY. See. *Bastard* . . . . . .

Page.

"INCOME" See *Division. Undivided family* 189
INCOHATE RIGHT: See *Alienation. Undivided family*
INFANT. See *Minority and Guardianship*:
INFANCY. See Do. do.
INHERITANCE. See *Stridanum*
In Southern India husband takes before mother 19
INSANITY.
of members of joint-family vests increased powers on manager . . 198
See *Division* 300

J

JAGHIRE. See *Division*
JUS REPRESENTATIONIS. See *Division* 300

K

KANOM. what. See 211
KARNAVEN. See *Undivided family* 210
KIST. See *Debt*
KRITRIMA. See *Adoption*
KSHATRAYIA. See *Adoption*

L

LAGNA. See *Marriage*
LAKIRAJ: See *Division* 297
LEARNING, gains of, when partible 229
See *Undivided family*
LEPER. See *Adoption*
LEWA KOOMBI. See *Marriage*
LUMBEDAR. See *Undivided Family* 190

M

MADMAN. See *Marriage. Insanity. Division.*
MAHRRATTA LAW. See *Debt*
MAINTENANCE.
widow's right of, out of husband's land, is personal . . . 31
„ „ cannot be sold in execution of decree . . 31
„ „ or be otherwise transferred . . . 31
is a charge on the inheritance 36,31
husband must maintain wife, living together . . . 31
or if she leaves him for just cause 31
widow entitled to, out of family funds, if chaste . . . 31
„ can compel husband's son to give, though property alienated 33
heir taking the property, chargeable in person and property, though he waste, or fraudulently transfer it 33

MAINTENANCE—*(continued.)* *Page.*
when property not charged with maintenance, purchaser takes it free of charge 33
widow can then only look to personal security of family . 33
where estate forfeited for rebellion, widow's right to maintenance out of it, not forfeited 34
right to, gives no right to *share* 34
even though co-heirs withdraw their claim 34
widow has right to share property assigned to separated husband 34
Amount of, determined by condition of parties 34
relatives need not maintain in same state as husband did . 34
maintenance not chargeable on official salary 34
nor on floating and uncertain income 35
nor where property inadequate to the charge 35
widow receiving sufficient pension from Government, not entitled to 35
Court may award where relations neglect 35
Stridanum not taken into account 35
land assignable for 35
How forfeited 45
. widow, whenever compelled by indigence, may claim from family . 35
acceptance of allowance, besides food and raiment, does not bar right to 35
if less allowed than proper, she may leave family house, and live with her own parents without forfeiting 35
wife refusing to live with husband, without just cause, entitled to smaller amount. *Semble* 35
right of widow attaches to husband's family, though he has separated . 35
where one of family forced to support, he can compel contribution from others 35
where father and son separate in interest, though joint in residence, food and worship; son's widow has no claim for, on father . . 35
husband forsaking chaste wife, she is entitled to ⅓ of his estate. *Semble* 37
this denied 37
unchaste wife forfeits maintenance 37
but must not be left to starve 37
wife living in adultery after divorce, not entitled . . . 37
chastity requisite in widow, to entitle to 37
wife leaving husband unjustly, not entitled to 37
alleged expulsion must be clearly proved 38
wife who will not live with husband, he need not support . 38
husband introducing concubine into house justifies wife leaving him . 38
wife leaving husband on his second marriage, entitled to . . 38
contra 38
husband, turning wife out unjustly, must maintain her . . 38
wife may not leave because husband is irreligious, immoral, or unfortunate 38
widow leaving husband's house, not for unchaste purposes, entitled to maintenance 38
where husband has not made residence imperative, she may live with own parents 38

MAINTENANCE—*(continued.)* *Page.*

widow may elect to live with husband's relatives or her own . . 39
husband alone liable while alive: not his or her relatives . . 39
where no paternal property, widow must reside with husband's family, and partake with them 39
she may visit her own parents 40
where paternal property, widow must reside with husband's family 40,42
obligation to maintain daughter-in-law depends on father-in-law's ability 40
Alya Sultana, law of; 42
according to, woman living with husband cannot claim from her own family 42
and wife usually resides with own family 42
so also according to *Maramoorkatayam*, wife *must* reside with own family 42
members of family living under, only entitled to maintenance in family houses 44
how secured: may be secured by assignment of land 35,45
Court may award gross sum 45
widow's rights; what are enforceable in Courts 45
„ may sue for back maintenance 45
decree for, may provide for future 45
though awarded, may divest for subsequent misconduct . . 46
suit for *arrears* of will lie in Small Cause Court 46
but Small Cause Court cannot try *right* to 46
right to, may be barred by Limitation 46
Other parties entitled to maintenance: *Goorookul's* son's widow entitled to out of emoluments of office 46
widow of illegitimate son of European by Hindu female, entitled to . 47
husband cannot give *all* to wife, to prejudice of heir . . . 47
widow cannot agree to forfeit maintenance 47
dancing girl need not support brother's widow 47
widow of separated son has no claim on his father 47
in *divided* family, widow can only claim from branch to which she belongs 47
in undivided family, widow entitled to maintenance only . . 47
brother-in-law need not support sister-in-law 47
widow not entitled to from step-grandson, or step-sons widow, while her step-son living 47
heirs of step-son bound to maintain her 47
widow entitled to, cannot make contracts binding on heir who has to maintain her 47
mother, entitled to from son, though she leaves him . . . 48
daughters, and daughter's sons entitled 48
senior widow succeeding, must maintain the junior widows . 48
brothers, when they must maintain brothers 48
step mother 48
unmarried daughters 48

MAINTENANCE—*(continued.)* *Page.*
unmarried daughters living apart from father without just cause, disentitled 48
unmarried sisters; nuptial expenses of 48
concubines 48
legitimate sons in undivided families 48
cannot be refused to, for simple disobedience 48
need not reside with father 48
nor need illegitimate 48
illegitimate son of three upper castes entitled to 49
„ „ of Soodra, by dancing girl, entitled to in interim, where he has not got the inheritance 49
of illegitimate son of Soodra got on other than slave-girl, entitled to 50
illegitimate son of incestuous intercourse *semble* entitled, though he does not inherit 50
mothers of illegitimate children entitled to 50
a son whose adoption is invalid 50
son's widows and daughters 50
son's widow must maintain father 50
undivided nephews must maintain uncle's son-less widow . . . 50
all persons (not out-castes) disqualified from inheriting, entitled to . 50
MANAGING MEMBER. See *Undivided family* . . . 193
MARAVER. See *Marriage* . . . . . .
MARAMORKATAYAM. See *Maintenance. Adoption.* . . .
Undivided family (Manager) 210
Division . . . . . .
MARRIAGE.
father bound to provide husband for daughter 1
„ may forfeit right by misconduct 1
what misconduct works forfeiture 1
Contract of: considered 2
is a valuable consideration 2
consent of parents of both parties requisite 2
right of giving daughter vests in father 2
father may delegate authority 2
„ delegation by, may be presumed 2
Wagdan, explained 2
father, on death of, in whom authority vests 2
guardian, not necessarily empowered to giving girl in marriage . 4
after *Wagdan* and *Saptapadi*, cannot be set aside, though irregular 4,11
bethrothal, with *Pullah*, irrevocable 4
only one bethrothal legal 4
unless it falls though from bridegroom's misconduct . . . 4
bethrothal in *Ausoora* form revocable 4
unless money paid 4
presents by parents returnable, if marriage falls through . . 4,8
promise by father to give daughter, enforceable at law . . . 4
consent, words of, constitute valid marriage 5

MARRIAGE—*(continued.)* Page,

ceremonies, immaterial 5
eight species of 5
Soodra may contract in *Brama* form 5
Asoora now most common form 5
„ frequently practised by Bramins 5
'*Classes*' do not mean '*sub-classes*' 5,6
Hindu, obeying Shastres, may marry daughter of bastard . . 5
Soodra need not marry woman of own caste 5
marriage presumed in proper form 5
man may marry woman of lower caste than himself . . 6
whether woman may marry man of lower caste; qu: . . . 8,60
Ghandarva and concubinage not identical 8
polygamy, legal 8,11,14
husband can claim wife at puberty 9
marriage, a sacrament 9
man mad, or dumb from birth, may marry 9
how far wife can bind husband by her contract 9,247
wife cannot sue husband for defamation 10
„ must obey husband 10
„ can sue, notwithstanding coverture 10
„ „ „ to protect husband's rights, in his absence . . 10
„ represents husband for many purposes 10
„ may sue her husband 10
„ may sue jointly with husband, or without 11
whether a husband can rob his wife; Qu: 11
husband may supersede his wife 11
in *Lewa Koombi* caste, divorce requires husband's assent . . 11
in *Maravar* caste 11
divorce, eo nomine, unknown 11
husband may marry again; wife *aliter* 11
whether wife entitled to maintenance after 12
wife, converted to Mahomedanism, may re-marry other than Hindu 12,14
divorce does not entail forfeiture of *peculium* 12
husband can claim damages from adulterer 12
suit will lie for restitution of conjugal rights 13
„ enforceable, how 13
„ not by convert to Christianity for Hindu wife . . . 13
Habeas Corpus: by convert for person of Hindu wife . . 13
in *Talapadi Koli* caste, wife cannot leave husband and re-marry without his consent 13
man she so marries, adulterer 13,15
effect of Act of 15 of 1856 on re-marriages 13,1
Lagna marriage 14
Pat marriage 14
Natras marriage 14
Sikh second marriage 14

MARRIAGE—*(continued.)* Page.
woman, guilty of *bigamy* by second marriage 14
convert, relapsing, and remarrying, not *bigamist* . . . 14
Adyagni 18
according to *Alya Sultana*, a system of concubinage . . 45
METES AND BOUNDS. See *Division* . . . . .
MIDNAPORE: See *Undivided family* . . . . .
MINORITY AND GUARDIANSHIP.
1 *Duration* of; Regulation XXVI of 1793 (Bengal) extends minority of parties under *Courts of Wards* to completion of eighteenth year of age 109
so also in Madras and Bombay Regulations . . . 114
minors have qualified power of contracting; and express or implied contract for necessaries is absolutely binding on a minor . . 109
minor cannot state or settle account, so as to bind himself thereby 109,114
he cannot authorize another to do that for him, which he cannot do himself 109
in Madras, Bombay, Mitthila, and Benares, minority ends at seventeenth birthday 113
in Bengal, held that a father can by will postpone vesting of property in son after majority 114
aliter in Madras 114
age may be ascertained by inspection 114
Effect of minor's acts . . . . . .
how far minor's acts bind him 114
cannot sell ancestral estate 114
cannot execute lease 114
purchaser for valuable consideration without notice . . 114
minor widow can adopt 115
minor cannot make will 115
how far infancy a good plea 115
cannot take advantage of own fraud 115
cannot affirm and disaffirm guardian's acts . . . 115
must elect 115
on coming of age, may confirm own or guardian's acts . . 115
confirmation express or implied 115
by implication, instances of 115
„ silence 115
„ acquiescence 116
Limitations 117
express confirmation 117
Guardianship.
who may be guardian 118
testamentary guardian 118
nymputro; effect of 118
Duties and powers of guardian 118
must show *optima fides* 118
acting on considerations of necessity 119

MINORITY AND GUARDIANSHIP—*(continued)* *Page.*
debts contracted by, for *necessity* bind infant . . . 119
conveyance by, must be shown to be for minor's benefit . 119
compromise by 119
reference to Punchayet by 299
sale by, to pay off debts of infant's father. 119
necessity, *bonâ fides*, benefit to infant, to be considered . . 119
money borrowed by, for father's *shrad* 120
„ „ for mother's *shrad* 120
party dealing with, bound to enquire 121
onus, on whom it ordinarily lies 121
adequacy of consideration 122
where transaction on face prejudicial 123
where *bonâ fide* lender not affected by previous mismanagement of estate 123
where danger to estate arises from act to which lender himself is a party 123
where purchaser not bound to see to application of purchase-money . 124
minor bound by all *proper* acts of 124
where minor on attaining majority may sue on acts or omissions of . 124
when guardian acts in fraud of infant 124
„ „ *ultra vires* 124
father may authorize guardian to make charges for maintenance 125
inncocent purchasers 125
sale by elder brother of minor's property, when valid . . 125
guardian acting *extra vires* himself responsible 125
guardian removeable for misconduct 125
„ refusing to produce accounts 126
manager appointed by will, only removeable for malversation &c. . 126,193
guardian, when removeable by civil suit or summary application . 126
guardian bound to protect estate by suit 127
infant may sue by, or by next friend 127
„ must appear as Defendant by 127
„ may sue his guardian 127
„ suit will lie on behalf of 127
not only where malversation, but where transaction not for his benefit .127
when he can claim partition 128
on division, share of infant must be secured 131
guardian has right to custody of infant 131
right of custody of person of converts 192
infant not liable for ancestor's debts 133
„ not affected by acts of adults 133

MISCONDUCT.
of father works forfeiture of right to give daughter in marriage . 1

MISSING PERSON. See *Debt* . . . . . ,
MITACSHARA. See *Stridanum. Undivided family. Division.* . 200
MITTHILA. See *Adoption. Undivided family* . . .
MOHUBBUR. See *Division* . . . . . .
MOTHER. See *Division* 295

Page.

MOOTAH or MITTAH. See *Division*
MOVEABLES. See *Division* 295

N

NATRAS. See *Marriage*
NECESSARIES. See *Minority*
NECESSITY.
what will justify sale. See *Widow, Minority, Undivided family.*
will justify sale by manager 199
performance of *shrad* justifies borrowing by father . . 203
not sufficient to produce decrees discharged, but consideration on which money borrowed must be shown 204
what 239
NITIYA. See *Adoption* 55

O

'OBSTRUCTION.' See *Undivided family*
OOPANYANA. See *Adoption*
ORPHAN. See *Adoption*
OTTI, what 211

P

PARENTS. See *Marriage*
PARGHAVULLY TENURE. See *Division*
PAT. See *Marriage*
PATTAM. See *Division*
PECULIUM. See *Marriage, Stridanum*
POLYGAMY. See *Marriage*
POLLIUM. See *Division*
POSSESSION. See *Undivided family*
of one is possession of all joint-members . . . 241
adverse 241
PRAJAPATAYA. See *Marriage: species of.*
PRESENTS. See *Marriage*
PRINCIPAL AND SURETY.
Surety need not be sued first 248
PROSTITUTES;
gains by prostitution legal 229
PRIMOGENITURE. See *Division. Zemindar. family-Custom. Division.*
PULLAH. See *Marriage*
PULLAKA PUTRA. See *Adoption*
PURCHASER:
see *Benamee, Minority. Undivided Family, Division.*
how far bound to inquire, where dealing with manager or guardian 194
onus of proving necessity, on whom cast 200

PURCHASER :—*(continued.)* *Page.*

mere fact that property stands in name of one of joint-family need not protect 201
where parties interested allow one to hold himself out as owner, purchaser not bound 202
owners lying by, will be bound by act 202
from wife, where husband alive, without inquiry, is not protected 202
where debt created by performance of *Shrad* 203
where debt created by father 203
where sale by father invalid, b. f. purchaser for v. c. entitled to be re-couped before deprived of purchase 232
must prove necessity of sale 232
not bound to see to application of purchase-money 232,234
where son, under *Mitacshara*, shows no necessity and no acquiescence, sale set aside without re-couping 232
unless purchase-money has reached family funds, and son had benefit of it 234
qu. whether assets can be pursued into hands of creditor who in such case retains personal remedy against heir &c. . . . 243

PUT. See *Adoption* . . . . . .
PUTNI BHAGA. See *Division* 298
PUTRI BHAGA. See *Division* 298
PUNCHAYET. See *Division.* 299

R

RACHSASA. See *Marriage*: species of. . . . . .
RAJ. RAJAH. See *Division* . . . . . .
REDDY CASTE: CUSTOM OF ILLATOM. See *Illatom* . .
REGALITIES. See *Division.* . . . . . .
RELIGIOUS ENDOWMENTS. See *Undivided family. Division* . .
RESULTING TRUST. See *Benamee* . . . . . .
RE-UNION. See *Undivided family* . . . . . .
takes place, when after division, family or members of, come together again by agreement 250,253
members of re-united family succeed to each other, to exclusion of those not re-united. 253
on re-union, joint interest presumed 251
must be satisfactorily proved 251
mere mixing of *minor's* share with other re-united member's property, no proof of re-uniting by minor 251
to constitute, must be by original parties to division . . . 251
their descendants may re-unite, but it will not affect inheritance . 251
family re-uniting may impress property with legal trusts . . . 253

S

SAMONADACAS. See *Stridanum* . . . . . .
SAPINDAS. See *Adoption* . . . . . .
SAPTAPADI. See *Marriage* . . . . . .

SCIENCE. Page.
gains of, when partible 229
See *Undivided family. Division.*
SELF-ACQUISITION. See *Undivided family* . . . 224
„ *Division*
SHASTRES. See *Marriage* . . . . . .
SHRAD. See *Undivded family* 190
See *Marriage* . . . . . .
father has a right to perform, and may borrow for. . . 203
SHOTRIUM. See *Division. Undivided family.* . . . . .
SIKH. See *Marriage. Adoption.* . . . . . .
SISTERS; DIVISION BY, does not alter course of succession . . 21
SLAVE-GIRL: See *Bastard. Stridanum.* . . . . .
SMRITI CHANDRICA. See *Stridanum* . . . . .
SON. See *Undivided family. Division* . . . . . .
SOODRAS. See *Marriage. Undivided family. Division.* . . . .
SOUDAYACA. See *Stridanum.* . . . . . .
SPENDTHRIFT: may be manager, but removeable . . . 194
STATED AND SETTLED ACCUNT. See *Minority* . . .
STRIDANUM.
property acquired by a woman by inheritance, is not . . . 17
Mitacshara doctrine dissented from 18
property inherited by a mother from son, is not . . 18,23
Adhyagni, what; descent of 18
doctrine of *Smriti Chandrica* 18
by descent, loses its quality of *Stridanum* 19,29
follows, thereafter, ordinary rule of descent 19
husband only heir to wife's strictly *peculium* 21
Bombay law—Grady—Bühler 23
Mitacshara doctrine does not include immoveables . . . 24
personalty given to woman at marriage is *peculium* . . 24,28
all *gifts* by husband to wife for affection, are *peculium* . . 24
gift of money, by son, to mother, for maintenance, *peculium* . . 24
wife cannot dispose of immoveable *Stridanum.* . . . 24,26
immoveable property *given* by man to grandson's wife, *peculium* . 24
personalty given by man to wife on his second marriage, *peculium* . 24
aliter, as to realty 24
Mesne profits, *Stridanum* 24
Soudayaca 25,27
all property acquired by woman during coverture does not pass to husband 25
onus of proving *Stridanum* 25
in famine, husband may dispose of wife's ornaments for formance of duty &c., *quære* 25,29
relation taking, a thief 28
husband's creditor cannot seize *Stridanum* in execution . . 25

STRIDANUM.—(*continued.*) *Page.*
wife consenting to sale of her property to redeem family property, entitled to be re-couped 25
legacy, from husband, or own relations, *Stridanum* 26
„ from strangers, wife cannot dispose of, without husband's consent 26
she cannot alienate *land* given by husband 26
other *Stridanum* widow may dispose of 26
dower of wife pre-deceasing husband without issue, passes to him, as heir 28
Stridanum not forfeited by divorce 29
„ devolves according to form of marriage 29
„ *Ordo Successionis* 29,30
gift of *land* to woman by *father*, she may dispose of 29
Stridanum may be given to slave-girl on nuptials 29
gift by *mother* to *daughter*, descent of 30
Samonadacas not heirs of, by *Mitacshara* 30
death-bed gift of *peculium* to strangers, good, where no heir . . 30
betrothed daughters do not share in mothers's *Stridanum* . . . 30
unbetrothed, inherit with sons 30
among *Mahrrattas*, succession depends on endowment . . 30
daughter becoming incurably blind in infancy, is she heir, or only entitled to maintenance ? 30
married daughters not excluded by *Dayabhaga* or *Mitacshara* . 30
SUPERSESSION. See *Marriage.* . . . . . .
SURETY. See *Principal and Surety* . . . . . .
SURVIVORSHIP. See *Debt* . . . . . .
„ benefit of, is general rule among co-heirs . . . 22,244
whether those who take by, take *cum onere* 244

T

TALAPADI KOLI. See *Marrriage* . . . . . .
TARAWAD. See *Undivided Family* 210
TIRHOOT. See *Adoption. Undivided family* . . . . . .
TORAS GORAS. See *Division* . . . . . .
TRADE. See *Division* 295
TRUSTEE. Manager, not for adults of joint-family 195
TRUST. See *Re-union* . . . . . .

U

UNDIVIDED HINDU FAMILY : *Status of* ;
presumption is in favour of 134,145
onus of proof 134
whole property of each member presumed to belong to common stock . 169
onus lies on asserter of contrary . . 169,177,180,181
analogies to, in English law 173
where self-acquisition asserted, *criterion*—whence purchase-money came 174
but this though the chief, not only criterion . . . 175

UNDIVIDED HINDU FAMILY: *Status of*;—*(continued.)* Page.
purchase must be *bonâ fide*, not ostensible . . . 175
necessity of tracing the funds, how far it extends . . 175
commensality per se, no proof of source of acquisition 175,177,178,183
„ proof of existence of joint funds, as well as, requisite . 176
separate living not conclusive proof of division . . 178,184,188
residence in dwelling house on account of marriage, gives no title to share 178
'*Illatom*' 178
presumption from joint living rebuttable by proof of non-existence of ancestral estate 178
failing such proof, property is joint 179
joint messing consistent with division . . . 179
Shrad, joint performance of, consistent with division . . 179
Mitacshara, under, where ancestral property proved, presumption is that all property is joint 179
separate residence 184,185
„ management 184
actual separation of property how far necessary to constitute *division* . 183
division may be inferred from circumstances. . . . 183
„ „ what circumstances? 184
joint management of villages, evidence of undivision . . . 183
formal division upheld against the parties asserting its concoction for their own fraudulent purposes 186
purchase in name of one of several joint members, no proof of division 187,189
nor registration of his name alone in Collector's books . .187,190
nor his carrying on law-suit in respect to boundaries . . . 187
nor refusal of judge to give other members share of costs in such suit 187
property standing in name of one, no proof of division . . 187
name of one used in documents „ „ . . 187,201
alienation of shares „ „ . . 187
parcels held in severalty „ „ . . . 187
Lumbadar, entry of one as „ „ . . 187
„ possession of, is on behalf of all, till rebutted . . 187
mutation of names in Collector's register 188
succession, when joint, to ancestral property, joint tenancy presumed till contrary shown 188
caste invitations to joint-members, evidence of joint *status* . . 188
property acquired by member drawing income from property funds, joint 188
separate trading no proof of division 189
division presumable from long acquiescence 189
„ „ from litigation *inter se* 189
one member may purchase from another 189
members may contract with each other as to separate acquisitions: *e. g.* to repay advance, for family purposes 189

UNDIVIDED HINDU FAMILY: *Status of;—(continued.)* Page.
agreement not to sell may bind the parties 189
„ „ but not their heirs 189
contribution between, for debts paid by one 189
income; division of, consistent with undivision as to *corpus* . 190,191
profits of family estate, property purchased with, is joint . . 191
„ case when family consists of fathers and sons, and when all brothers 191
re-purchased property; presumption is that it is joint . . . 191
dangerous state of the law—illustrated by cases . . . 191
illegitimate sons of Christians by Hindu women, *status* of . . 193
Quære—has each member, before division, a definite share . 193,218

Managing Member.
usually eldest male 193
though not necessarily, where disqualifications exist . . . 193
not removeable, because another better qualified . . . 193

Powers of
distinction between manager and guardian 194
sale by for necessity valid; though minor members . . . 194
purchaser, how far protected 194
manager is not *trustee* for adults of family 195
is not bound to account like partner 197
can only deal with property for family benefit . . . 198
consent, what necessary by other members, to render his alienation valid 198
when other members insane, powers enlarged 198
may sell part of family estate in case of need 199
„ all „ „ 199
„ mortgage „ „ 199
must not sell more than enough to meet necessity . . . 199
though a small excess is of no consequence 199
when money cannot otherwise be raised 199
vendee or mortgagee will have lien on all sold or mortgaged *Caveat emptor* 200,205
Mitacshara, under; son's consent necessary to father's alienation; but not for necessity, or maintenance 200,203
one member ostensibly held out as owner 202
family shall not take advantages of *status*, to defraud . . . 202
purchaser from wife, while husband is alive 202
debts contracted by father for immoral purposes . . . 202
„ „ for pressing necessity . . . 204

Mitacshara
one of joint-family cannot, without consent of *all* members, alienate, without necessity 207
in *Bombay*, where sale sought to be set aside because consent of all not shown, onus on Plaintiffs 208
manager cannot deal with property for own sole benefit . . 209
if he does, his share will be bound 209

UNDIVIDED HINDU FAMILY: *Status of*;—*(continued.)* Page.
can mortgage his share in Bombay and Madras . . . 209
can sell 209
bond, must it recite purpose of "loan"? 209
may sue for family 209
family bound by his suit 209
„ how far by his acts 210
cannot plead own act *ultra vires*, to defraud creditors, purchasers &c. 210
Powers of &c., under *Maramookatayam*, and *Alya Sultana* law . 210
senior male of whatever branch is *Karnaven* 210
on *Karnaven's* death, his senior male relative succeeds . . . 210
when junior member manages, consent of eldest presumed . . 210
eldest may interpose and eject him 210
in default of males, females manage 210
when by custom management by females, senior entitled . . 210
what causes disqualify for *Karnavenship* 210,212
Karnaven's Powers . . . . . .
no Anandraven by himself entitled to account from . . . 210
assent of all *Tarawad* necessary to valid sale 210
consent implied, where deed signed by *Karnaven* and senior *Anandraven* 210
dissent must be proved by those who allege it 210
chief *Anandraven's* signature, though usual, not indispensable . 210
can bind *Tarawad* by debt on their behalf 210
Tarawad seizable in execution on suit against *Karnaven* . . 210
„ taking possession of estate of deceased *Karnaven* . . 210
responsible for debts of his management 211
Karnaven can make *Otti* mortgage by himself 211
Otti; *Kanom*; what 211
Uayama right 211
Karnaven in possession of family funds presumed to make all acquisitions for corporate body 211
such presumption rebuttable 211
self-acquirer may alienate during life 211
if he do not, property falls into family 211
who accept it *cum onere* 211
Tarawad, property acquired by any member of, presumed joint . 212
Stanom-holder cannot alienate, to detriment of family, nor mortgage or charge it 212
Karnaven: disqualified by what causes 212
„ is a mere trustee for Tarawad 212
Power of members, other than Manager, to alienate 212
land acquired by ancestral property not alienable by one . . 212
co-sharer cannot alter condition of property, without consent of the others 212
if he pledges own share, it is subject to equities of other members . 213
by *Mitacshara*; can one member alienate own share? in Bengal, held he cannot 213
in Bengal, by *Dayabhaga* one can sell own share . . . 213

UNDIVIDED HINDU FAMILY: *Status of;—(continued.)* Page.
in *Orissa*, he cannot 213
in *Tirhoot* he cannot 213
in *Mitthila* he cannot 213
where consent necessary, majority cannot bind . . 213
father's power: differs under *Dayabhaga* bad *Mitacshara* . . 214
sons "in-cohate right" under *Mitacshara* 214
no such right under *Dayabhaga*. 214
in *Behar*, consent of sons necessary 214
in *Tirhoot*, the same 214
in *Mitthila*, the same; in *Madras*, same; in *Midnapore*, the same .
in *Bengal* alone, father can alienate without son's consent . . 214
Shotriumdar can only alienate for own life 214
under *Mitacshara*, father cannot settle ancestral property without son's consent (per *Peacock* C. J.) 215
cannot alienate to one member, to detriment of others . . . 215
in *Bengal* only, sons *heirs* 215
in *Madras* and *Bombay*, none can sell joint-estate except for necessity 215
alienation by father with son's consent cannot be questioned by grandsons, under *Mitacshara* 215,232
qu; when father improperly alienates, whether he can give purchaser more than a right to what shall fall due on division . . 215
seller can alienate share according to the law as laid down in *Madras*; *contra*, in *Bengal* 219
he cannot, according to the law, as laid down in *Bombay* . . 223
Qu, whether power to compel division is not test of power to alienate 223
father in *Madras* School may alienate own share 224
no distinction between father and other co-parceners in *Madras* . 224
father cannot compromise son's in-cohate right 224
„ may alienate his own gems &c. 224
„ sale by, of ancestral property, not void, but voidable . 224
purchaser, what he must prove 224
„ when he must be re-couped purchase-money . . . 224
'*necessity*;' instances of what is, and what not . . . 225,229
sale proceeds presumed to have reached common fund, till rebutted 226
father may sell small part for pious uses, without son's consent , 228
such pious uses, what 228
son can only prevent father's acts of waste *(Mitacshara)* . . . 228
father has no definite share which he can alienate . . . 230
„ only liable to controul where heritage liable to *obstruction* . 230
nephew, whether he can object to alienation by uncle . . .
son's interest is limited 230
„ no suit by, during father's life, for ancestral property . . 230
„ „ except for a division . . . 230
„ in same position as other heir apparent . . . 230
right of a co-parcener not tolled by statutable bar to division . 230

UND IVIDED HINDU FAMILY: *Status of*;—*(continued.)* *Page.*
father, qu ! as to larger power over self-acquisition than over ancestral 231
„ cannot alienate self-acquisition 231
„ after-born sons avoid sale of? 231
sons acquire rights only from date of birth 231
„ „ „ or at earliest, of conception. 231
„ in-cohate right of 232
„ not affected by father's fraud 232
father, in *Bengal*, may alienate, without consent of sons . . 233
„ „ may give to one son to exclusion of rest . . . 233
„ „ though sinful to do so 233
„ „ may not make unequal division 233
„ „ gift by to stranger, valid 233
„ „ sale by, while in jail, valid 233
„ under *Mitacshara*, may alienate *self-acquired* immoveable property 234
every co-parcener may alienate his self-acquisition under *Mitacshara*. 234
this always the law in *Bengal* 234
once descended, or divided, self-acquisition loses its character . 234
quære, whether under *Benares* law self-acquisition alienable . . 234
brothers do not share in it 234
self-acquirer may will it away 234
where father, self-acquirer, has not disposed of, son's share his self-acquisition equally 234
the same between father and sons, of grandfather's self-acquisition 234
Self-acquisition, what: 235
test to decide character 235
land purchased by co-partner with borrowed money, and acquired without use of joint funds, is 235
property converted does not lose joint-character 236
„ acquired by joint-labour, without use of joint-funds, is joint . 236
on division, elder brother entitled to larger share 236
larger contributor entitled to larger share 236
property acquired by means of education, learning, or science, imparted by family, joint, ... 236
aliter, if education imparted from other quarters 237
property acquired by prostitution 238
landed property confiscated by Government, and bestowed on Zemindar is his self-acquisition 240
so of an Enam confiscated and given again 240
property acquired without use of family funds, is 240
gifts, for personal consideration, *e. g.* for marriage 240
possession of one is possession of all 240
Debts; liability of estate for joint and several. See *Debt* . . 241
Re-union. See *Re-union* 250
URAYAMA. See *Undivided Family* . . . . .

V

VALUABLE CONSIDERATION. See *Marriage* . . .

W

WAGDAN. See *Marriage* . . . . . *Page.*
WIDOW. See *Maintenance. Division*
co-widows, division by, does not alter course of succession . 21
caution necessary in parties dealing with 201
her interest a life estate 236
liable for family debts to extent of assets received from husband . 247
not liable to pay husband's debts out of her separate property, except by special agreement 247
successor to, bound by her debts necessarily contracted . 250
WIFE. See *Husband and Wife* . . . . . .
purchaser from 202
her power to contract under coverture 247
liability of husband for her debts 247
WILLS.
unknown to Hindu Law 150
how far they may operate 151
cannot prevent division 298

Y

YAUTACA: See '*Division*' . . . . . .

Z

ZEMINDARIES, ANCIENT, MODERN: See '*Division*' . .

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